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SUPREME COURT, U.S.
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No.

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IN THE

Supreme Court of the United States

October Term, 1995

THE CITY OF CHARLESTON and THE
CITY OF SOUTH CHARLESTON,

Petitioners,

v.

PUBLIC SERVICE COMMISSION OF WEST VIRGINIA;
BOYCE GRIFFITH, Chairman; OTIS D. CASTO,
Commissioner; RICHARD D. FRUM, Commissioner;

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR WRIT OF CERTIORARI

James D. Kauffelt
Kauffelt & Kauffelt
803 Kanawha Valley Building
Charleston, West Virginia 25301
(304) 345-1272

Attorney for Petitioners

86 pp

QUESTIONS PRESENTED

1. What is the appropriate standard for deciding whether an impairment of municipal bond contract covenants is "substantial," and, therefore, a violation of the Contract Clause?

2. On review of Cross-Motions for Summary Judgment, did the Court of Appeals, in reversing judgment *for* Petitioners and directing judgment for Respondents, apply the correct standard, under F.R.C.P. 56, to Petitioners' evidence (viewing it in the light most favorable to Petitioners)?

TABLE OF CONTENTS

Page

Table of Authorities v

INTRODUCTION 2

OPINIONS BELOW 2

JURISDICTION 3

RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES 3

STATEMENT OF THE CASE 4

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT 9

I. The Court of Appeals erred in its analysis of whether the impairment of the Cities' municipal bond covenants was a substantial impairment 9

A. The opinion below correctly observed that the Supreme Court has not provided a clear standard 9

B. The opinion below errs in mixing standards from cases involving public contracts with those from cases involving private contracts 10

C. The opinion below errs in finding that the standard should be lower for a regulated industry 13

D. A correct analysis shows substantial impairment 18

II. The Decision of the Court of Appeals conflicts with those of other courts on the substantial impairment issue.....21

A. The opinion below conflicts with decisions of other Courts of Appeals.....21

B. The opinion below conflicts with decisions of state Supreme Courts.....22

III. The Court of Appeals applied an improper standard in evaluating the District Court's grant of summary judgment to the Cities 23

A. In directing entry of judgment for the PSC, the opinion below does not view the Cities' evidence in the light most favorable to Cities as non-moving party.....23

B. The opinion below did not fairly read the bondholders affidavit 24

C. The opinion below erred in finding that a 1989 collection mechanism "replaced" the 1990 repeal of the right to place liens 26

CONCLUSION 26

TABLE OF AUTHORITIES

CASES — Page

Adkins v. G. D. Searle & Co.
971 F.2d 132 (8th Cir. 1992) 24

Allied Structural Steel Co. v. Spannaus
234 (1978) reh. den. 439 U.S. 886 ..... 11, 12

Baltimore Teachers Union v. Mayor and City Council of Baltimore
6 F.3rd 1012 (4th Cir. 1993)
cert. denied 114 S. Ct. 1127 (1994) 10, 21

Caritas Services, Inc. v. State, DSHS
123 Wash.2d 391, 869 P.2d 28 (1994) 15, 23

City of Charleston v. Public Service Commission of West Virginia
57 F.3d 385 (4th Cir. 1995)..... 2, passim

Continental Illinois National Bank v. State of Washington
696 F.2d 692 (9th Cir. 1983)
appeal dismissed 460 U.S. 1077 (1983)
reh. den. 461 U.S. 950 (1983)..... 14, 21, 25

Energy Reserves Group, Inc. v. Kansas Power & Light Co.
459 U.S. 400 (1983)..... 12, 13

General Motors Corp. v. Romein
112 S. Ct. 1105 (1992).....12
George D. Hardin, Inc. v. Village of Mt. Prospect
99 Ill.2d 96, 457 N.E.2d 429 (1983) 23

Holiday Inns Franchising, Inc. v. Branstad
29 F.3rd 383 (8th Cir. 1994).....16, 21

Local Division 589, Amalgamated Transit Union v. Massachusetts
666 F.2d 618 (1st Cir. 1981).....11

New Jersey Highway Authority v. Sills
109 N.J. Super, 424, 263 A.2d 498 (Ch. Div. 1970)
supp. opinion 111 N.J. Super 313, 268 A.2d 308 (Ch. Div. 1970)
affirmed p.c.o.b. 58 N.J. 432, 278 A.2d 489 (1971).....22

Patterson v. Carey
41 N.Y.2d 714, 363 N.E.2d 1146 (1977).....22

State of Nevada Employees Ass'n, Inc. v. Keating
903 F.2d 1223, 1226 (9th Cir. 1990).....21

United States Trust Co. of New York v. New Jersey
431 U.S. 1 (1977).....10, passim

CONSTITUTION, STATUTES AND RULES

F.R.C.P. 56.....24

United States Constitution, Article I, § 10,
Cl. 1 ..... 3, passim
Title 28 United States Code Section 1254 3
West Virginia Code § 8-18-23..... 3, passim
West Virginia Code § 8-18-23(c) 5
West Virginia Code § 16-13-16 ..... 4, passim

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INTRODUCTION

The City of Charleston, West Virginia, and The City of South Charleston, West Virginia, ("Cities") petition for a Writ of Certiorari to the June 9, 1995, opinion of the United States Court of Appeals for the Fourth Circuit. Petitioners submit this statement to demonstrate that the Supreme Court has jurisdiction of the Writ of Certiorari and it should exercise that jurisdiction to review the decision of the Court of Appeals.

OPINIONS BELOW

The June 9, 1995, opinion of the United States Court of Appeals for the Fourth Circuit is reported in 57 F.3d 385 and is attached as Appendix A. The Court of Appeals reversed the District Court's Summary Judgment for the Cities, and directed entry of Summary Judgment for Respondents.

The District Court for the Southern District of West Virginia, on Cross-Motions for Summary Judgment, had granted the Cities' Motion by unreported Memorandum Opinion dated September 1, 1994, attached as Appendix B, and had granted the Cities' requested relief in an unreported Judgment Order entered September 1, 1994, attached as Appendix C.

JURISDICTION

The jurisdiction of this Court to review the June 9, 1995, opinion of the United States Court of Appeals is conferred by Title 28, United States Code, Section 1254.

RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES

The Cities' case is based upon the Contract Clause of the United States Constitution, Article I, § 10, Cl. 1:

> No state shall. . . pass. . . any Law impairing the Obligation of Contracts. . . .

The Cities claim that a statute passed by the West Virginia Legislature in 1990 impaired their obligation, under pre-existing municipal bond contracts, to place liens for delinquent sewer charges on all "premises served," and to collect from the owners of those premises, by amending into W. Va. Code § 8-18-23[1] the following proviso:

> [A]n owner of real property may not be held liable for the delinquent rates or charges for services or facilities of a tenant, nor shall any lien attach to real property for the reason of delinquent rates or charges for services or facilities of a tenant of such real property unless the owner has contracted directly with the municipality to purchase such services or facilities.

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[1] For full text of W. Va. Code § 8-18-23, see Appendix D.

The West Virginia Legislature left unchanged W. Va. Code § 16-13-16[2], incorporated into the Bond Contracts by reference and by law, which provides, regarding sewer charges, that:

> . . . charges for the use of and the service required by such works, [are] to be paid by the owner of each and every lot, parcel of real estate or building that is connected with and uses such works. . . . All such rates or charges, if not paid when due, shall constitute a lien upon the premises served by such works . . . . Whenever any rates, rentals or charges . . . remain unpaid . . . the property and the owner thereof, as well as the user . . . shall be delinquent. . . .

STATEMENT OF THE CASE

Petitioner City of Charleston, West Virginia, is a municipality providing sewer service to 24,047 customers. Petitioner City of South Charleston, West Virginia, is a municipality providing sewer service to 6,111 customers.

Respondents are The Public Service Commission of West Virginia, a state government agency which regulates public utilities, and its three Commissioners, in their official capacity.

Prior to 1989, Petitioner Cities sold five municipal bond issues to finance improvements to their sewer systems.

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[2] For full text of W. Va. Code § 16-13-16 see Appendix E.

The bonds are written contracts between the Cities and the bondholders. The bond contracts contain explicit covenants, and incorporate, by reference and by law, certain statutes.

Among the explicit covenants in the bond contracts were promises by the Cities that all charges for sewer service, if not paid when due, would be "a lien on the premises served," and that ". . . the property and the owner thereof, as well as the user of the services . . ." would be liable for the payment of the charges.

One of the statutory provisions forming a part of the bond contracts by law is W. Va. Code § 16-13-16 (attached as Appendix E), which requires a municipality issuing sewer revenue bonds to establish rates for services ". . . *to be paid by the owner* of each and every lot, parcel of real estate or building that is connected with and uses such works. . . " and further provides: "All such rates or charges, if not paid when due, *shall constitute a lien upon the premises served* by such works." (Emphasis supplied.) This statutory provision is incorporated into the bond contracts by specific reference as well.

The legislative enactment at issue is an amendment of *W. Va. Code* § 8-18-23(c), effective June 8, 1990 (attached as Appendix D). In the 1990 Act, a proviso was added to *W. Va. Code* § 8-18-23(c), stating:

> Provided, That an owner of real property may not be held liable for the delinquent rates or charges for services or facilities of a tenant, nor shall any lien attach to real property for the reason of delinquent rates or charges for

services or facilities of a tenant of such real property. . . .

Thus, the 1990 Act created an exemption from sewer liens and owner responsibility only for municipally-served rental property. The 1990 Act did not amend *W. Va. Code* § 16-13-16. Further, the 1990 Act did not prohibit public service districts from placing liens for unpaid sewer charges on rental properties, or from collecting from owners of rental properties.

On March 30, 1992, in response to complaints from landlords, Respondent Public Service Commission of West Virginia ("PSC") issued two orders retroactively applying the 1990 Act to the Cities, despite the language in the bond contracts and the unaltered commands of *W. Va. Code* § 16-13-16. The PSC ruled that the 1990 Act prohibited the placing of liens on the property of landlords whose tenants failed to pay their sewer bills, and that the 1990 Act relieved a landlord/property owner from responsibility for payment for sewer service rendered to his rental property by a municipality unless the landlord/property owner has specifically contracted for the service rendered.

The Cities then filed a Complaint in the District Court alleging that the PSC's Orders, applying the 1990 Act to them, violated the Contract Clause by prohibiting them from placing liens on rental premises for which sewer bills were not paid, and by prohibiting them from collecting those bills from the property owners, so long as the previously existing bonds remained outstanding.

The Cities and the PSC both filed Motions for Summary Judgment. In support of their Motion, the Cities

established by affidavits (attached as Appendices F and G) that while 34.5% of Charleston's total sewer service accounts were rental properties, 73.3% of Charleston's *delinquent* accounts were rental properties; and that while 15.7% of South Charleston's total accounts were rental properties, 64.4% of South Charleston's *delinquent* accounts were rental properties.

These affidavits revealed that Charleston's delinquency rate for rental properties was 14.6%, and for owner-occupied properties 2.8%. South Charleston's delinquency rates were 64.7% for rental properties, and 6.7% for owner-occupied properties.

The Cities also established by Affidavit (attached as Appendix G) that Charleston "would have continued to place liens for unpaid sewer charges on rental properties, and would have continued to use every lawful means available to collect unpaid sewer charges from all those liable, including owners of rental properties", if the PSC had not issued its March 30 Orders.

The "Affidavit of Daniel B. Yonkosky" (attached as Appendix F) stated that the West Virginia Water Development Authority ("WDA"), owner of both of Charleston's bond issues and of South Charleston's 1986 bond issue, specifically bargained for and received the lien covenants from the Cities. The WDA considered the obligations of the Cities to place liens on "all premises served" to be "important financial security provisions;" and that it believed the prohibition of liens on rental property to have deprived it "of a substantial part of the means to ultimately collect the money that the Cities owe it."

The Cities also presented the District Court with the deposition testimony of George Farley, who introduced the bill which became the 1990 Act. He testified that he introduced the bill at the behest of two landlords from his county. The bill was not addressed to any broad or general problem, and was only motivated by the fact that the placement of sewer liens on rental property "did not seem fair."

The PSC told the District Court that the only public purposes served by the 1990 Act were the elimination of an "inequity" and the benefit of the receipt of other revenues. The PSC was unable to explain why such purposes are served by the landlord exemption from municipal sewer liens and payments, when public service districts (another form of political subdivision providing sewer service) continued to be allowed to place such liens and collect from landlords.

The Cities' affidavits also established that the Cities operated several public service district sewer systems immediately adjacent to their boundaries, and connected to the Cities' own sewer systems. There were no differences in the economic and social characteristics of the areas served by the Cities' systems and the public service districts' systems, and there were no broad or general social or economic problems affecting municipalities which did not equally affect public service districts.

Thus, the uncontradicted evidence before the District Court was that there was no justification for prohibiting sewer liens on rental property in municipalities, while leaving them on (1) owner-occupied property in municipalities, and (2) on all premises served by public service districts, other than to

confer a special benefit on landlords who own rental property in municipalities.

The two Affidavits filed by the PSC in support of its Motion in the District Court concerned only the overall financial condition of the Cities' sewer systems, and whether they had made their bond payments. The Cities did not deny that they had made all payments on their bonds when required. (Impending financial ruin is not an element of an impairment claim.) The PSC did not contradict the fact that large percentages (34.5% and 15.4%) of the Cities' accounts are rental property accounts, or that the 1990 Act prohibits placement of liens on those properties and collection from their owners, or that the WDA, as owner of the bonds, expected to receive the Cities' covenants to place liens on *all* premises served, rental and owner-occupied alike, or that this was an important security provision in the eyes of the WDA.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

I. The Court of Appeals Erred In Its Analysis Of Whether The Impairment Of The Cities' Municipal Bond Covenants Was A Substantial Impairment.

A. The opinion below correctly observed that the Supreme Court has not provided a clear standard.

The opinion below, in beginning its analysis of whether the impairment here was "substantial," noted that the

Supreme Court "has provided little specific guidance as to what constitutes a 'substantial' contract impairment." [Citation omitted.] (Appendix A, p. 17(a)) As the Fourth Circuit recently noted in *Baltimore Teachers Union v. Mayor and City Council of Baltimore*, 6 F.3d 1012 (4th Cir. 1993), *cert. denied*, 114 S. Ct. 1127 (1994), there is a wide spectrum between an acceptable "technical" impairment and the unacceptable "total repudiation" of a contract. "The ground between these spectral ends, though, has yet to be charted with any precision." 6 F.3d at 1017.

The Supreme Court should take this opportunity to clarify this area of Contract Clause jurisprudence. Lower courts, both state and federal, have reached widely varying results on similar facts, due to this imprecision. It is important, in a time of some uncertainty in the municipal bond markets, to clarify that bonds are afforded special status under the Contract Clause. Repeal of bond covenants, for no reason other than to benefit a special interest group, should always be considered a substantial impairment.

B. The opinion below errs in mixing standards from cases involving public contracts with those from cases involving private contracts.

In *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1 (1977), ("U.S. Trust"), the United States Supreme Court addressed a factual situation so similar to the facts here that the decision in *U.S. Trust* has controlling effect. However, the Court of Appeals did not recognize that later Supreme Court Contract Clause decisions do not involve governmental financial obligations , as did *U.S. Trust*, and, therefore, misapplied those cases.

Since the decision in *U.S. Trust* in 1977, several Supreme Court cases have discussed the Contract Clause, but none of these subsequent cases involved a municipal bond contract, which is subject to a higher level of scrutiny. However, the Court of Appeals relied heavily on these cases, and made the fundamental error of not recognizing this Court's "higher level" of protection of municipal bond contracts.

In *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978) reh. den. 439 U.S. 886, the contract at issue was a private pension plan, which was altered by a Minnesota statute. The Court held that the statute at issue clearly violated the Contract Clause, because it "was not even purportedly enacted to deal with a broad, generalized economic or social problem." In addition, "It did not effect simply a temporary alteration of the contractual relationships of those within its coverage, but worked a severe, permanent, and immediate change in those relationships - irrevocably and retroactively." 438 U.S. at 250. This case extended the *U.S. Trust* holding to a contract between private parties.

In *Local Division 589, Amalgamated Transit Union v. Massachusetts*, 666 F.2d 618 (1st Cir. 1981), then-Circuit Judge (now Justice) Breyer wrote that *U.S. Trust* "suggests moderately close court scrutiny of legislation that conflicts with prior *public* contracts." He compared the different levels of deference to be accorded legislative acts affecting *public* and *private* contracts. He then observed:

> More importantly, *United States Trust* limits its stricter "review" approach to state laws in the "financial" area - laws which impair a state's "financial obligations."

* * *

> . . . we note that the *United States Trust* facts presented a paradigm of the type of protection that the Contract Clause was designed to offer - a protection given to those who invested money, time and effort against loss of their investment through explicit repudiation. [Citations omitted.]

666 F.2d at 642.

Two years later the difference in analysis was explicitly stated in *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400 (1983): "In *United States Trust Co.*, but not in *Allied Structural Steel Co.*, the State was one of the contracting parties. When a State itself enters into a contract, it cannot simply walk away from its financial obligations. In almost every case, the court has held a governmental unit to its contractual obligations when it enters financial or other markets. [Citations omitted.] When the State is a party to the contract, 'complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the States' self-interest is at stake.' [Citation omitted.]" 459 U.S. at 412, n. 14.

This Court's most recent Contract Clause case is *General Motors Corp. v. Romein*, 112 S. Ct. 1105 (1992). Justice O'Connor stated the Court's method of analyzing a Contract Clause claim as follows:

> Generally, we first ask whether the change in state law has "operated as a substantial impairment of a contractual relationship."

> [Citations omitted.] This inquiry has three components: whether there is a contractual relationship, whether a change in law impairs that contractual relationship, and whether the impairment is substantial. Normally, the first two are unproblematic, and we need address only the third.

112 S. Ct. at 1109-1110.

This methodology was adopted in the opinion below, but without recognition of the "public" and "financial" nature of the Cities' bonds. This omission skewed the resulting analysis against the Cities.

"The Supreme Court has not examined the constitutionality of a state law which impairs a public contract since *U. S. Trust*. The Court's decisions in *Energy Reserves Group* and *Exxon* do not indicate that the Court would defer to state legislatures when public as opposed to private contracts are at issue." *State of Nevada Employees Ass'n., Inc. v. Keating*, 903 F.2d 1223, 1226 (9th Cir. 1990). This case is an appropriate vehicle for clarifying when an impairment of a bond covenant is "substantial."

C. The opinion below errs in finding that the standard should be lower for a regulated industry.

The opinion below made much of the fact that sewer utilities are regulated by the state. (Appendix A, pp. 14(a)-16(a), 18(a)-19(a).) This emphasis is wrong as a matter of law, and misplaced since that regulation never extended to municipal bond covenants.

In *Continental Illinois National Bank v. State of Washington*, 696 F.2d 692 (9th Cir. 1983), appeal dismissed, 460 U.S. 1077 (1983), reh. den. 461 U.S. 950 (1983), the Court of Appeals affirmed the District Court's judgment that municipal bond contracts had been impaired, even though the State of Washington had historically regulated electric power production (the financing of which led to the bond issue which was impaired), and the operation of its political subdivisions. These factors were not sufficient to save the statute from a Contract Clause challenge. 696 F.2d at 702.

While the fact of regulation is apparent, it is also clear that the PSC has no authority over the terms of municipal bond contracts. This argument was rejected in *Continental Illinois National, supra:*

> Defendants also argue that a municipal corporation, such as WPPSS, remains subject to state regulation and cannot be allowed to contract itself out from state control. That argument misperceives the nature of the restriction on state action imposed by the contract clause. As a creature of the state a municipal corporation derives its power from the legislature. Once having granted certain powers to a municipal corporation, which in turn enters into binding contracts with third parties who have relied on the existence of those powers, the legislature (or here, the electorate) is not free to alter the corporation's ability to perform. (Citations omitted.) WPPSS remains subject to state regulation, but if the State significantly alters WPPSS's ability

> to perform previously negotiated agreements, it impairs obligations of contract.

696 F.2d at 699-700

However, the Court of Appeals here chose to ignore this case. It also erred in relying on West Virginia cases regarding the pervasiveness of public utility regulation. Every case upon which it relied involved contracts setting *rates*. None was a municipal bond case.

Several recent cases have found impairment in heavily regulated industries. In *Caritas Services, Inc. v. State, DSHS*, 123 Wash.2d 391, 869 P.2d 28 (1994), the Supreme Court of Washington considered a public contract impairment claim under the United States Constitution, regarding Medicaid reimbursement methodology agreements. The Court noted that the United States Supreme Court had "consistently affirmed 'a dual standard of review' for impairment of contract cases," and noted public contracts receive "more stringent examination under the Contract Clause" than do private contracts. 123 Wash.2d at 403, 869 P.2d at 35 n.6.

In dealing with the question of whether the impairment is substantial, that Court found that "[a] contract is impaired by a statute which alters its terms, imposes new conditions or lessens its value." 123 Wash.2d at 404, 869 P.2d at 36.

Given the Medicaid program's "wide and heavy net of regulation," the Washington Court confronted the argument that such regulation defeats an impairment claim.

> . . . the seminal case on this aspect of contract clause doctrine limited itself to state

> impairment of private contracts, not public contracts. *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 412 n.14, 103 S. Ct. 697, 705 n.14, 74 L.Ed. 2d 569 (1983).
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> * * *
>
> In almost every case, the Court has held a governmental unit to its contractual obligations when it enters financial or other markets. *Energy Reserves*, at 412 n.14, 103 S. Ct. at 705 n.14.
>
> * * *
>
> The set of expectations defined by heavy regulation does not and cannot include the expectation that a state will retroactively abrogate its contracts in violation of the contract clause.

123 Wash.2d at 405-06, 869 P.2d at 36.

In *Holiday Inns Franchising, Inc. v. Branstad*, 29 F.3rd 383 (8th Cir. 1994), the Court held that a statute regulating franchise transfers impaired pre-existing franchise contracts. The Court noted that franchise arrangements had been heavily regulated by the state. However, the fact of such regulation did not serve to justify the impairment. That Court observed:

> We do offer, however, some observations on a very troublesome aspect of current Contract-Clause jurisprudence. The Supreme Court has held that in determining

> whether an impairment is substantial, and thus unconstitutional, a court should take into account whether the kind of contract or relationship that furnishes the subject matter of the dispute had previously been the subject of regulation. In Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 250, 98 S.Ct. 2716, 2725, 57 L.Ed.2d 727 (1978), for instance, the Court said that the relevant inquiry was whether the disputed legislation operated "in an area already subject to state regulation at the time the company's contractual obligations were originally undertaken," or whether, instead, it "invaded an area never before subject to regulation by the State." A later case states the matter a little differently and, perhaps, more narrowly. In Energy Reserves Group, Inc. v. Kansas Power and Light co., 459 U.S. 400, 411, 103 S.Ct. 697, 704, 74 L.Ed.2d 569 (1983), the Court indicated that the proper consideration was "whether the industry the complaining party has entered has been regulated in the past." The idea, evidently, is that if the party to the contract who is complaining could have seen it coming, it cannot claim that its expectations were disappointed.

29 F.3d at 384-85.

Here, the "regulation" found by the Court of Appeals is general oversight of public utilities, which was unaffected by the District Court's ruling. The PSC has *never* regulated the terms or enforcement of municipal bond contract covenants, so the opinion below should not have used the

"regulated industry" factor to find the impairment not substantial.

D. A correct analysis shows substantial impairment.

U.S. Trust, supra, involved statutory covenants in bonds issued by the Port Authority of New York and New Jersey, which promised that the Port Authority would not use any of its revenue for railroad acquisitions, unless certain stringent financial requirements were met.

In 1972, the two states' Legislatures repealed, *prospectively,* this financial limitation, leaving the statutory covenant in force until the bonds containing it had been paid off, while removing that specific covenant from the provisions of any bonds issued in future. However, two years later, in 1974, the two states enacted statutes to repeal the covenant retroactively. 431 U.S. at 14.

This fact pattern is crucial. The Cities would have no complaint if the 1990 Act had been construed to apply only prospectively, like the 1972 enactment in *U.S. Trust.* It is the retroactive application of the 1990 Act to previously issued bonds which makes its effect like the retroactive 1974 enactment in *U.S. Trust.*

The Supreme Court began its analysis in *U.S. Trust* by examining the question whether the retroactive repeal of the statutory covenant did, in fact, impair ". . . the obligation of the States' contract with the bondholders. It long has been established that the Contract Clause limits the power of the States to modify their own contracts as well as to regulate

those between private parties. [Citations omitted.]" 431 U.S. at 17.

The Supreme Court noted that the parties ". . . sharply disagree about the value of the 1962 covenant to the bondholders. . . ." However, the Supreme Court disposed of this factual dispute as irrelevant and immaterial to its decision, stating:

> As a security provision, the covenant was not superfluous; it limited the Port Authority's deficits and thus protected the general reserve fund from depletion. Nor was the covenant merely modified or replaced by an arguably comparable security provision. Its outright repeal totally eliminated an important security provision and thus impaired the obligation of the States' contract. [Citation omitted, footnote omitted.]

431 U.S. at 18-19.

In this case, the Cities clearly showed the lien covenant was not "superfluous."

Moreover, a contract to which a state is a party is evaluated under a higher standard than would be applied to a statute impairing the obligation of a contract between two private parties. This constitutional standard is higher still when the state's own contract involves financial matters. "Whatever the propriety of a State's binding itself to a future course of conduct in other contexts, the power to enter into effective financial contracts cannot be questioned." 431 U.S. at 24. Despite the argument that such contracts involve

relinquishment of a state's spending or taxing powers, ". . . the Court has regularly held that the States are bound by their debt contracts." 431 U.S. at 24. (Footnote omitted.) The Court discussed several cases involving impairment of municipal bond contracts, stating: "State laws authorizing the impairment of municipal bond contracts have been held unconstitutional." 431 U.S. at 25, n. 22.

The Supreme Court went on to note that subsequent modifications were not absolutely barred. The impairment may be constitutional ". . . if it is reasonable and necessary to serve an important public purpose. In applying this standard, however, complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake." 431 U.S. at 25-26. On the other hand, "total destruction" of a financial obligation is not necessary before its impairment will be found to be unconstitutional. (The trial court had erroneously applied a "total destruction" test.) The Supreme Court then observed that *only one time in the twentieth century* had it sustained alteration of a municipal bond contract, 431 U.S. at 27, and said it would not "balance away" the Contract Clause. The Court held that the repeal of the bond covenant was a violation of the Contract Clause.

The 1990 Act is very similar to the legislation invalidated in *U.S. Trust*. The explicit and the statutory covenants include a promise by the Cities that they will enact, enforce and *collect* rates and charges "to be paid by the owner of each and every lot, parcel of real estate or building, and that "All such rates or charges, if not paid when due shall constitute a lien upon the premises served by such works."

The 1990 Act impaired these statutory covenants by banning the statutorily-required lien (which attaches to "premises served," not to customers or users), and the required collection from the owners thereof. Thus, the lien, and the ability to collect from property owners, has been eliminated as to rental properties, but not as to owner-occupied properties.

II. The Decision Of The Court of Appeals Conflicts With Those Of Other Courts On The Substantial Impairment Issue.

A. The opinion below conflicts with decisions of other Courts of Appeals.

A comparison of the facts in this case with other decisions of various courts of appeals indicate a wide variation in application of the "substantial impairment" standard. The Supreme Court should take this opportunity to provide guidance in this area.

For example, it is hard to reconcile the opinion below with the Fourth Circuit's earlier opinion in *Baltimore Teachers Union v. Mayor and City Council of Baltimore,* 6 F.3d 1012 (4th Cir. 1993), *cert. denied*, 114 S. Ct. 1127 (1994), where a five-month minor pay reduction amounting to 0.95% of annual salary, *was* held substantial. *See also Continental Illinois National Bank, supra,* (requirement of voters' approval for additional financing held substantial impairment of existing bonds by Ninth Circuit); *Holiday Inn Franchising, Inc., supra,* (alteration of franchise transfer and termination terms held substantial by Eighth Circuit); and *State of Nevada*

Employees Assoc., Inc., supra, (minor alteration of pension withdrawal rights held substantial by Ninth Circuit).

B. The opinion below conflicts with decisions of state supreme courts.

A number of state supreme courts have found a violation of the Contract Clause by impairments much less substantial than that here. In *New Jersey Highway Authority v. Sills*, 109 N.J. Super. 424, 263 A.2d 498 (Ch. Div. 1970), supp. opinion, 111 N.J. Super. 313, 268 A.2d 308 (Ch. Div. 1970), affirmed p.c.o.b., 58 N.J. 432, 278 A.2d 489 (1971), a statute was enacted exempting National Guard members and Army Reservists from payment of turnpike tolls. The lost revenue was estimated to be $27,300, out of total revenues of over $46,000,000, and the Court noted that ". . . I cannot foresee any possibility that toll-free passage by guardsmen and reservists as provided in the two statutes will ever cause a default on bonds now outstanding or will ever create a situation which might threaten a default." 268 A.2d at 309. Nevertheless, the bond contracts were held to be substantially impaired.

In *Patterson v. Carey*, 41 N.Y.2d 714, 363 N.E.2d 1146 (1977), a statute rescinding a toll road rate increase was found to be an unconstitutional impairment of bond contracts. The trial court had found that the Authority would not default due to the impairment. (". . . this loss of revenue will not endanger the security of said bonds and will not precipitate any actual default . . ." 370 N.Y.S.2d 783, 792 (Sup. Ct. 1975).) In upholding and expanding the trial court's finding of impairment, the Court of Appeals of New York stated: 'Since the toll is the sole source of funds for bond repayment, any limitation on the Authority's power to collect a toll

sufficient to pay the bonds deprives the bondholders of an essential attribute of their contract with the authority and with the State and jeopardizes their investment . . . . With the present statute, the Legislature has diminished the bondholders' rights by suspending one increase and limiting the Authority's previously broad discretion to impose future increases. Thus, the statute has deprived the bondholders of a right granted by their contract with the Authority and the State." 363 N.E. at 1152.

Similarly, the Supreme Court of Illinois, in *George D. Hardin, Inc. v. Village of Mt. Prospect*, 99 Ill.2d 96, 457 N.E. 2d 429 (1983), found a minor modification of forty year old special assessment bonds to be a substantial impairment.

These cases, and the Washington Supreme Court's decision in *Caritas Services, supra,* to which the Court of Appeals' attention was directed, are not mentioned in the opinion below. They constitute a conflict in interpretation between state and federal courts as to the meaning of "substantial impairment," which conflict calls for the Supreme Court's attention.

III. The Court of Appeals Applied An Improper Standard In Evaluating The District Court's Grant Of Summary Judgment To the Cities.

A. In directing entry of judgment for the PSC, the opinion below does not view the Cities' evidence in the light most favorable to the Cities as non-moving party.

In reviewing a grant of summary judgment, an appellate court should apply the same standard as the District Court applies under F.R.C.P. 56, and should view the evidence in the light most favorable to the non-moving party, and should afford the non-moving party the benefit of all reasonable inference to be drawn from the evidence. *Adkins v. G. D. Searle & Co.*, 971 F.2d 132 (8th Cir. 1992).

The opinion below fails to properly apply this standard, which requires shifting that "favorable light" one hundred eighty degrees when evaluating *cross* Motions for Summary Judgment. First, in deciding whether to affirm the judgment appealed from, the appellate court must cast the "favorable light" on the losing party below. Then, if the appellate court determines that the trial court erred, and must, therefore, decide whether the trial court should have granted the losing party's Cross-Motion, the appellate court must shift that "favorable light" to shine on the evidence of the prevailing party below. Rarely, if ever, should this result in the appellate court directing judgment *for* the losing party below, rather than remanding for trial.

B. The opinion below did not fairly read the bondholders affidavit.

The opinion below violates this standard and, in fact, goes out of the way to mischaracterize the Cities' evidence, especially the two Affidavits attached to this Petition as Appendices F and G. For example, the opinion below unfairly characterizes the Yonkosky Affidavit (Appendix G), and refused to recognize that the PSC did not contradict any of the statements of Mr. Yonkosky as to what the WDA bargained for in purchasing the bonds. Since this evidence was not contradicted by the PSC, it was properly relied upon by the District Court. The Cities' undisputed proof was that the purchaser of the bonds has been deprived of an important

financial security provision. The Court of Appeals should have recognized this point, and, at the least, remanded the case for trial, rather than directing summary judgment for the PSC.

The PSC's evidence was infected with a fundamental error that was correctly recognized and dismissed by the District Court, but which was accepted by the Court of Appeals, that of assuming that "impairment of the obligation of a contract" is a constitutional violation only if it impairs the ultimate "performance" of the contract. In other words, if the Cities do not default on their bond payments, there is no impairment. Analysis of the Cities' financial condition, or asking if they have defaulted, is not the test. The obligations impaired are explicit contractual agreements with bondholders that the Cities will place liens on "premises served" when bills are not paid, and will collect from the "owner thereof."

The PSC argued, and the Court of Appeals apparently agreed, that, since the Cities are still paying their bondholders on time, there is no impairment. As the District Court correctly held, the Constitution protects "obligations" not just "performance." The fact that the Cities are still able to meet their bond payments is not dispositive of the issue whether or not the bond contracts have been impaired. "Absent the payment of just compensation, the repeal of a particular security provision impaired an obligation of contract even though the bondholders might have retained other contractual security." *Continental Illinois National Bank, supra*, 696 F.2d at 700.

In this case, the Cities demonstrated, without contradiction, that the 1990 Act, as applied to them by the

PSC, does destroy their ability to place liens on rental premises served and to collect from owners thereof. This constitutes 34.5% of all premises served in Charleston, and 15.7% of all premises served in South Charleston. The Court of Appeals, at the least, should have accorded the Cities a favorable view of this undisputed fact, and recognized that it prevents entry of summary judgment for the PSC.

C. The opinion below erred in finding that a 1989 collection mechanism "replaced" the 1990 repeal of the right to place liens.

The opinion below also went far beyond proper appellate review standards to rule that a legislative enactment in *1989* replaced the ability to place liens on rental properties, which repeal was enacted in 1990. It is illogical to argue that a provision enhancing collection, enacted in 1989, was enacted for the purpose of replacing a security provision deleted one year later, in 1990. Thus, the argument that the landlord lien provision was replaced by a far superior legislated provision is simply false. The water service termination provision as enacted in 1989, the elimination of rental property liens was enacted in 1990.

Again, the Court of Appeals should have given the Cities the benefit of the doubt in viewing their evidence on this point, which was sufficient to withstand summary judgment for the PSC.

CONCLUSION

In characterizing the bond security provisions in *U.S. Trust*, the Supreme Court noted that "The States promised that

revenues and reserves securing the bonds would not be depleted . . . . " 431 U.S. at 25. Here, the State of West Virginia promised municipal sewer revenue bondholders that the Cities shall have a duty to establish rates and charges "to be paid by the owner of each and every lot, parcel of real estate or building that is connected with and uses" the sewer system, and that "All such rates and charges, if not paid when due, shall constitute a lien upon the premises served by such works." These promises have been substantially impaired. The Court of Appeals should be reversed, and the case remanded for further development.

Respectfully submitted,

James D. Kauffelt
Attorney for Petitioners
Kauffelt & Kauffelt
803 Kanawha Valley Building
P. O. Box 3082
Charleston, W. Va. 25331
(304) 345-1272

APPENDIX

APPENDIX A

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

City of Charleston; The
City of South Charleston,
Plaintiffs-Appellees,

v.

Public Service Commission of West Virginia; Boyce Griffith, Chairman; Otis D. Casto, Commissioner; Richard D. Frum, Commissioner,
Defendants-Appellants.

No. 94-2285

Appeal from the United States District Court
for the Southern District of West Virginia, at Charleston.
Dennis R. Knapp, Senior District Judge.
(CA-93-161-2)

Argued: March 8, 1995

Decided: June 9, 1995

Before HALL and MOTZ, Circuit Judges, and
WILLIAMS,

United States District Judge for the District of Maryland, sitting by designation.

Reversed and remanded by published opinion. Judge Motz wrote the opinion, in which Judge Hall and Judge Williams joined.

COUNSEL

ARGUED: Richard Edward Hitt, Charleston, West Virginia, for Appellants. James David Kauffelt, KAUFFELT & KAUFFELT, Charleston, West Virginia, for Appellees. **ON BRIEF:** Cathy Culhane, Charleston, West Virginia, for Appellants. T. D. Kauffelt, KAUFFELT & KAUFFELT, Charleston, West Virginia, for Appellees. Carolyn C. Atkinson, City Attorney, CITY OF SOUTH CHARLESTON, South Charleston, West Virginia for Appellees.

OPINION

MOTZ, Circuit Judge:

The district court held that a 1990 West Virginia statute and related orders of the state's Public Service Commission (PSC) impaired contractual obligations contained in sewer bond contracts between two West Virginia cities and their bondholders in violation of the Contract Clause of the United States Constitution,[1] and so

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[1] The Constitution of the United States provides: "No state shall. . . pass any . . . Law impairing the Obligation of Contracts . . . ." U.S. Const. Art. 1, § 10, cl. 1. The West Virginia Constitution similarly

granted summary judgment to the cities. Because the statute and orders do not constitute a substantial impairment of any contractual right, we reverse and remand.

I.

The West Virginia Legislature has allotted certain authority for the operation of sewer systems to municipalities, *see* W. Va. Code § 16-13-1 *et seq.*, and certain authority for their operation to the PSC. *See* W. Va. Code 24-1-1 *et seq.* The boundaries of the division of that authority have long been a point of contention. *See, e.g., City of Benwood v. Public Service Comm'n,* 83 S.E. 295 (W. Va. 1914). There is no dispute, however, that the cities of Charleston and South Charleston (collectively, the cities) have the authority to issue sewer revenue bonds. *See* W. Va. Code § 16-13-16. Conversely, the cities acknowledge that because they own and operate sewage collection and treatment systems that are public utilities, they are subject to the jurisdiction of the PSC and that the PSC is "empowered by Chapter 24 of the West Virginia Code to regulate the rates, charges, practices and procedures of public utilities."

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provides: "No . . . law impairing the obligation of a contract shall be passed." W.Va. Const. Art 3, § 4. The cities rely on both constitutional provisions, and the district court held both were violated. "In construing [its] state constitutional provisions[s]," the Supreme Court of Appeals of West Virginia has "generally accepted the United States Supreme Court's interpretation of the similar provision contained . . . in the United States Constitution." *Shell v. Metropolitan Life Ins. Co.,* 380 S.E.2d 183, 184 sylb. pt. 1. (W. Va. 1989). Accordingly, we treat the federal and state constitutional claims together.

The present controversy arises from five separate bond series issued by the cities and the contractual obligations contained in the respective bond contracts. Charleston has two outstanding sewer revenue bond issues relevant to this action, both issued in 1989. South Charleston has three relevant outstanding bond issues, issued in 1956, 1961, and 1986, respectively. The bond contracts provide that all rates and charges, if not paid when due, shall be "a lien on the premises served."

Each of the bonds was issued pursuant to a separate bond ordinance. Both Charleston bond ordinances and the 1986 South Charleston bond ordinance provide:

> The City will. . . take all steps, actions, and proceedings for the enforcement and collection of such fees . . . to the full extent permitted or authorized by the laws of the State, and the rules and regulations of the PSC. All such rates and charges, if not paid when due, shall become a lien on the premises served by the System.
>
> The City further covenants and agrees that it will, to the full extent permitted by law, and the rules and regulations promulgated by the PSC, discontinue and shut off the services and facilities of the System . . . .

These ordinances further state that they "shall be deemed to be and shall constitute a contract between the city and such Registered Owners," that the relevant bond "is authorized and issued under and in full compliance with the Constitution and the statutes of the State of West Virginia,

including particularly Article 13 of Chapter 16 of the Code of West Virginia," and that "[a]ll such covenants, agreements and provisions shall be irrevocable, except as provided herein, as long as any of the Bonds or the interest thereon is Outstanding and unpaid." Although the entire text of the bond ordinances and bond contracts is not included in the record, the portions that are included indicate (and the parties do not assert to the contrary) that the remaining two South Charleston bond ordinances and contracts contain similar, although not identical, language.

In addition, the cities maintain that § 16-13-16 of the West Virginia Code "form[ed] a part of these contracts between the Cities and their bondholders, as if written verbatim into the bonds themselves." That statute requires, *inter alia*, that a municipality issuing sewer revenue bonds establish rates "to be paid by the owner" and that those charges "if not paid when due shall constitute a lien upon the premises served." W. Va. Code § 16-13-16. The cities contend that the bond issues "constitute binding contractual obligations to the various purchasers of the bonds" that the cities will use the remedies outlined in the state and local legislation, including the power to impose liens, to collect from delinquent users and so protect the investments of the bond purchasers relating thereto.

In 1989, the West Virginia Legislature amended § 8-18-23 of the West Virginia Code to allow sewer utilities, like the cities, to require utilities providing water service to terminate that service to a user who has failed to pay sewer bills. The statute further provided that "the owner, user, and property shall be held liable at law until such time as all such [sewer] rates and charges are fully paid." A year later, the Legislature again amended § 8-18-23 to provide:

> *[A]n owner* of real property *may not be held liable* for the delinquent rates or

> charges for services or facilities of a tenant, *nor shall any lien attach to real property* for the reason of delinquent rates or charges for services or facilities of a tenant of such real property unless the owner has contracted directly with the municipality to purchase such services or facilities.

(Emphasis added). In other words, after 1990, an owner could not be held personally liable and a lien could not be placed on his property to recover sewer charges owed by delinquent former tenants.

Thus, in the original bond contracts, the cities were empowered, "to the extent permitted" by "the laws of the state and rules and regulations of the PSC," to collect delinquent sewer charges by imposing a lien on "premises served," including those that were leased, even if only the tenant (and not the landlord) was delinquent. However, in the bond contracts, the cities were not empowered to insist that water service provided by a utility other than themselves be shut off if a user was delinquent in paying its sewer bill to the cities. The effect of the 1989 amendment to § 8-18-23 was to grant cities this additional remedy - the right to insist upon the termination of water service to any delinquent sewer user. The effect of the 1990 amendment was to remove the lien remedy as to rental property, i.e., no liens could be placed on an owner's property because a tenant failed to pay a bill.

In March, 1992, the PSC issued two orders ruling that Charleston could not require the termination of water service to landlords because their previous tenants failed to pay sewer charges. *See Copley v. Charleston Sanitary Board*, PSC Case No. 90-518-S-C; *Moore, et al. v. Charleston Sanitary Board*, PSC Case No. 90-120-S-C, *et*

al. The PSC reasoned that § 8-18-23, as amended, allowed termination of water service to delinquent sewer service users, but did not permit termination of water service to a rental property because prior tenants had not paid for sewer service.

In February, 1993, the cities initiated this action against the PSC and its individual members (collectively, the PSC), asserting that the 1990 amendment and the PSC's orders violated their rights under the Contract Clause. Accordingly, the cities asked the district court to declare that the 1990 amendment and the PSC orders constituted an unconstitutional "impairment of the contracts between the Cities and their sewer revenue bond holders." The district court granted summary judgment to the cities, finding that the amended statute constituted a "substantial impairment of the contractual relationship" between the cities and their bondholders, which was not justified by any "significant and legitimate public purpose."

II.

Initially, we consider the standing of the cities to make the claims pursued here. The cities assert that as a result of the 1990 amendment and the PSC's orders they "are suffering increasing delinquent accounts . . . . [which] directly and adversely affect the good financial condition of the cities' sanitary funds" and that "the contractual right granted" to the bond purchasers, which the cities "are contractually bound to protect and vindicate," is "directly and substantially impaired."

Very early in our history, the Supreme Court held that a municipal corporation cannot assert that its "creator" state has violated the Contract Clause by impairing a contract between the municipal corporation and the state which involves governmental powers and functions. *See,*

e.g., City of Covington v. Kentucky, 173 U.S. 231 (1899); *Williamson v. New Jersey,* 130 U.S. 189 (1889); *County Court of Cape Girardeau County v. United States,* 118 U.S. 68 (1886); *Town of East Hartford v. Hartford Bridge Co.,* 51 U.S. 511 (1850); *Trustees of Dartmouth College v. Woodward,* 17 U.S. 518 (1819).

In other cases, however, the Court suggested that if a city is performing a "private and proprietary," rather than "public and governmental," function, it might be able to invoke the Contract Clause against its parent state. *See, e.g., City of Worcester v. Worcester Consol. St. Ry.,* 196 U.S. 539, 551 (1905); *Hunter v. City of Pittsburgh,* 207 U.S. 161, 179-80 (1907). *But see City of Covington,* 173 U.S. at 238 (even assuming that city is performing a private function, the Contract Clause afforded it no protection).

The Court soundly rejected this distinction in *City of Trenton v. New Jersey,* 262 U.S. 182, 188 (1923). In *City of Trenton*, the state had granted a private waterworks company the right to take, without any fee, all necessary water from the Delaware River. After the city purchased the waterworks company, the state legislature enacted a statute requiring that every municipality pay a fee for water, in excess of a certain amount, taken from the river. The Supreme Court acknowledged that in prior cases it had suggested a possible distinction between contracts involving property owned by cities in their governmental capacity and those involving property owned by them in their proprietary capacity, but pointed out that in none of those cases was any right of a city held to be protected by the Contract Clause. The Court then dismissed the case before it for lack of jurisdiction, reasoning:

> [S]uch distinction [between governmental and proprietary functions] furnishes no

> ground for the application of constitutional restraints here sought to be invoked by the City of Trenton against the State of New Jersey. They do not apply as against the State in favor of its own municipalities. We hold that the City cannot invoke these provisions of the Federal Constitution against the imposition of the license fee or charge for diversion of water specified in the state law here in question . . . .

262 U.S. at 191-92; *see also Risty v. Chicago R.I. & P. Ry. Co.*, 270 U.S. 378, 390 (1926). Thus, it now seems settled, absent clear state law to the contrary,[2] that a city cannot assert that its creator state has violated the Contract Clause by impairing a contract *between the city and the state itself. See, e.g., Appling County v. Municipal Elec. Authority*, 621 F.2d 1301, 1308 (5th Cir.), *cert. denied*, 449 U.S. 1015 (1980); *Town of Charleston, R.I. v. United States*, 696 F. Supp. 800, 806-07 (D.R.I. 1988), *aff'd*, 873 F.2d 1433 (1st Cir. 1989).

There is also some support for the conclusion that a municipality has no standing to bring *any* suit based on the Contract Clause (or any other part of the Constitution) against the state that created it. In *Williams v. Mayor &*

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[2] The West Virginia courts have never directly addressed the question of whether a municipality has rights protected by the Contract Clause against subsequent impairment by its creator state. *Compare City of Boston v. Jackson*, 260 U.S. 309, 316 (1922), and *City of Pawhuska v. Pawhuska Oil & Gas Co.*, 250 U.S. 394 (1919). In early cases, they did entertain Contract Clause claims brought by municipalities against the State, but in those cases they did not consider the cities' standing to assert such a claim or even hold that there was a Contract Clause violation. *See, e.g., City of Charleston v. Public Service Comm'n*, 103 S.E. 673 (W. Va. 1920); *City of Benwood*, 83 S.E. at 208.

City Council of Baltimore, 289 U.S. 36, 40 (1933), the Court expansively asserted:

> A municipal corporation, created by a state for the better ordering of government, *has no privileges and immunities under the Federal Constitution which it may invoke in opposition to the will of its creator.*

(Emphasis added.) *Williams* has been followed largely in Fourteenth Amendment cases. *See Town of Ball v. Rapides Parish Police Jury*, 746 F.2d 1049, 1051 n.1 (5th Cir. 1984); *Village of Arlington Heights v. Regional Transp. Authority*, 653 F.2d 1149, 1151-53 (7th Cir. 1981); *City of South Lake Tahoe v. California Tahoe Regional Planning Agency*, 625 F.2d 231, 233-34 (9th Cir.,), *cert. denied*, 449 U.S. 1039 (1980); *City of New York v. Richardson*, 473 F.2d 923, 929 (2d Cir.), *cert. denied*, 412 U.S. 950 (1973); *see also* Paul M. Bator *et al.*, Hart & Wechsler's *The Federal Courts and the Federal System* 182 (2d ed. 1973) ("Municipal corporations have regularly been denied standing in the federal courts to attack state legislation as violative of the federal Constitution, on the ground that they have no rights against the state of which they are a creature."). But, in *Coleman v. Miller*, the Court expressly indicated that this principle was also applicable in the context of a Contract Clause claim:

> Being but creatures of the State, *municipal corporations have no standing to invoke the contract clause* or the provisions of the Fourteenth Amendment of the Constitution in *opposition to the will of their creator.*

307 U.S. 433, 441 (1939) (emphasis added) (dictum).

The *Coleman* statement was, however, only dictum, and we have been unable to find a single federal case *holding* that a city cannot sue its parent state for impairing a contract between the city and a third party,[3] let alone one so holding when the city has a contractual obligation to protect the third party's rights under the contract.[4] Furthermore, in suits by creditors of a city or town, it has long been recognized that even though a municipality is just a creature of the state, a state cannot, consistent with the Contract Clause, abolish the municipality without preserving to its creditors some effective means to collect the debts owed to them. *See Graham v. Folsom*, 200 U.S. 248, 253-54 (1906); *Town of Mount Pleasant v. Beckwith*, 100 U.S. 514 (1879).

Moreover, doubts have been expressed as to whether the "broad dicta" that "a political subdivision may never sue its maker on constitutional grounds" is really "the rule." *See San Diego Unified Port Dist. v. Gianturco*, 651 F.2d 1306, 1309 (9th Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982); *see also City of South Lake Tahoe v. California Tahoe Regional Planning Agency*, 449 U.S.

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[3] In fact, *St. Cloud Public Service Co. v. City of St. Cloud*, 265 U.S. 352 (1924), and *Superior Light & Power Co. v. City of Superior*, 263 U.S. 125 (1923), implicitly support the cities' standing in the present case, as do – notwithstanding *City of Trenton v. New Jersey - City of Worcester v. Worcester Consol. St. Ry.*, 196 U.S. 539 (1905), and *City of New Orelans v. New Orleans Water Works Co., 142 U.S. 79 (1891).*

[4] One of the very few cases in which a city attempted to assert, on behalf of third parties, that the state had impaired a contract between the city and third parties is *Hunter v. City of Pittsburgh*, 207 U.S. at 179-80. There the city claimed that a state statute requiring consolidation of two cities impaired an asserted contract between the city and its citizens that they would only be taxed for the obligations of a particular city. The Supreme Court rejected the claim, not because the city lacked standing to bring it, but because the Court held no such contract existed between the city and its citizens.

1039, 1042 (1980) (White & Marshall, JJ., dissenting from denial of certiorari) ("Such a per se rule is inconsistent with [*Board of Educ. v.*] *Allen* [, 392 U.S. 236 (1968)]"); *Gomillion v. Lightfoot*, 364 U.S. 339, 344-45 (1960); *United States v. Alabama*, 791 F.2d 1450, 1455 (11th Cir. 1986), *cert. denied*, 479 U.S. 1085 (1987); *South Macomb Disposal Authority v. Township of Washington*, 790 F.2d 500, 504-06 (6th Cir. 1986); *Rogers v. Brockette*, 588 F.2d 1057, 1067-71 (5th Cir.), *cert. denied*, 444 U.S. 827 (1929).

Thus, whether the cities have standing to bring this suit is unclear. In this case we need not resolve this troublesome question because even if the cities have standing to maintain this action, their claim clearly fails on the merits.[5] Accordingly, we assume - without deciding - that the cities have standing to assert the Contract Clause claim made here and address the merits of that claim.

III.

The Contract Clause mandates: "No state shall . . . pass . . . any . . . Law impairing the Obligation of Contracts . . . ." U.S. Const. Art. I, § 10, cl. 1. The Supreme Court, however, has long held that this seemingly absolute prohibition is not absolute at all. *See, e.g., Energy Reserves Group v. Kansas Power & Light Co.*, 459 U.S. 400, 410 (1983); *Allied Structural Steel v. Spannaus*, 438 U.S. 234, 240 (1978); *United States Trust Co. v. New*

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[5] Standing, of course, is usually a threshold inquiry. However, the Supreme Court has recognized the propriety of avoiding difficult standing questions when, as here, even assuming a party has standing, it "has not made a case" for the relief sought. *See Chandler v. Judicial Council of the Tenth Circuit*, 398 U.S. 74, 86, 89 (1970); *see also Secretary of Navy v. Avrech*, 418 U.S. 676, 678-79 (1974); *United States v. Augenblick*, 393 U.S. 348, 351-52 (1969).

Jersey, 431 U.S. 1, 21 (1977); *Home Bldg. & Loan Ass'n v. Blaisdell,* 290 U.S. 398, 434 (1934).

Instead, the Court has developed a "three-part analysis for harmonizing the command of the clause with" those powers "necessarily reserved" to the states "to provide for the welfare of their citizens." *Baltimore Teachers Union v. Mayor and City Council of Baltimore,* 6 F.3d 1012, 1015 (4th Cir. 1993) (quoting *United States Trust,* 431 U.S. at 21*), cert. denied,* ____ U.S. ____, 114 S. Ct. 1127 (1994). Initially, a court must determine whether state law has, in fact, impaired any contract; if so, it must then determine if the contract was "substantially impaired;" if the state law is found to constitute a substantial impairment of the contract, a court must determine "whether that impairment is nonetheless permissible as a legitimate exercise of the state's sovereign powers."[6] *Id.; Spannaus,* 438 U.S. at 244; *United States Trust,* 431 U.S. at 17. Only if there is a contract, which has been substantially impaired, and there is no legitimate public purpose justifying the impairment, is there a violation of the Contract Clause.

A.

In the present case, the district court gave no consideration to the threshold inquiry of "whether there is a contractual relationship, [and] whether a change in law impairs that contractual relationship . . . ." *General Motors v. Romein,* ____ U.S. ____, 112 S. Ct. 1105, 1109 (1992). It is worth some analysis. Although the cities clearly entered into bond contracts with their bondholders,

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[6] As part of this third step, a court must determine if the impairment is "upon reasonable conditions and of a character appropriate to the public purpose justifying its adoption." *United States Trust,* 431 U.S. at 22.

the nature and extent of those contracts and whether they were impaired by the 1990 amendment are not at all clear.

At the time the bonds were issued, the Legislature authorized the cities "to insure revenue bonds," W. Va. Code § 16-13-1; "to make and enter into all contracts and agreements necessary or incidental to the performance of [their] duties and the execution of [their] powers under this article," W. Va. Code § 16-13-3; and to establish rates to "be paid by the owner," which "if not paid when due [would] constitute a lien upon the premises served." W. Va. Code § 16-13-16.[7] The cities entered into bond contracts covenanting to "diligently enforce and collect all fees." Those contracts provide that charges "not paid when due shall become a lien on the premises." On the other hand, the cities covenanted only to enforce and collect charges "to the full extent permitted or authorized by the laws of the State, and the rules and regulations of the PSC."

In a somewhat similar case, the West Virginia Supreme Court of Appeals, after examining the city's charter, rejected the city's contention that rate increases ordered by the PSC impaired "binding contracts" between the city and the private water company "regulating" the water company's "charges or activities" in violation of the Contract Clause because no "portion of the charter clear[ly] grant[ed] . . . [the city] authority" to enter into such

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[7] The PSC concluded that cities (like Charleston and South Charleston) which provide only sewer service are not covered by § 16-13-16, which applies to municipalities that provide both water and sewer service. The district court implicitly rejected this interpretation of § 16-13-16. For the purposes of this appeal, we will assume without deciding that the district court was correct and that § 16-13-16 is applicable to the cities. *See Delardas v. Morgantown Water Comm'n*, 137 S.E.2d 426, 431 (W. Va. 1964); *State v. Renick*, 116 S.E.2d 763 (W. Va. 1960).

"binding contracts." *City of Charleston,* 103 S.E. at 674-75 (citations omitted). The court explained:

> [T]he authority of the municipality so to restrict and limit the power of the state "must clearly and unmistakably appear, and all doubts must be resolved in favor of the continuance of the power." The intent to confer upon a municipality the power to make an inviolable contract of this nature cannot be implied.

Id.; see also City of Benwood, 83 S.E. at 297-98. Moreover, under West Virginia law:

> [A]ll contracts made by a utility relating to the public service must be deemed to be entered into in contemplation of the exercise by the state of its regulatory power whenever the public interest may make it necessary . . . although an otherwise valid contract is binding on the parties to it until a departure from such contract has been directed by competent authority.

Preston County Light & Power Co. v. Renick, 113 S.E.2d 378, 387 (W. Va. 1960); *see also United Fuel Gas Co. v. Battle,* 167 S.E.2d 890, 904 (W. Va.), *cert. denied,* 396 U.S. 116 (1969).

In view of the rigorous standards developed by the West Virginia courts and the fact that the bond contracts expressly state that the cities' enforcement authority is limited to that "authorized by the laws of the state, and the rules and regulations of the PSC," it well may be that the bond contracts at issue here were not impaired at all. As

Justice Holmes noted: "One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them." *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 357 (1908); *see also United States Trust*, 431 U.S. at 22; *Bannum, Inc. v. Town of Ashland*, 922 F.2d 197, 202-03 (4th Cir. 1990).

B.

Even if the bond contracts were impaired by the 1990 amendment, however, there would be no Contract Clause violation unless that impairment was substantial. The district court concluded that there had "indeed been a substantial impairment" because:

> Although the plaintiffs are able to meet their bond obligations at present,[8] they may not be able to do so in the future. Thus, whether the plaintiffs are able to pay bondholders is not the critical issue here. The plaintiffs had explicit contractual agreements with their bondholders to place liens on "premises served" when bills are not paid. The statutory amendment obliterating this agreement is a substantial impairment of it.

This summary analysis may be due to the fact that, as we noted in *Baltimore Teachers Union*, the "Supreme Court has provided little specific guidance as to what constitutes a 'substantial' contract impairment." 6 F.3d at

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[8] There was uncontradicted evidence that both cities maintained balances in their reserve accounts more than sufficient to cover the principal and interest due on the bonds.

1017. "Total destruction of contractual expectations is not necessary for a finding of substantial impairment." *Energy Reserves,* 459 U.S. at 41. It is established, however, that a finding of "technical impairment" is insufficient, i.e., such a finding is merely "a preliminary step in resolving the more difficult question of whether that impairment is permitted under the Constitution." *United States Trust,* 431 U.S. at 21.

In determining whether an impairment is substantial and so not "permitted under the Constitution," of greatest concern appears to be the contracting parties' actual reliance on the abridged contractual term. Specifically, the Supreme Court has examined contracts to determine whether the abridged right is one that was "reasonably relied" on by the complaining party, *Spannaus,* 438 U.S. at 246, or one that "substantially induced" that party "to enter into the contract." *City of El Paso v. Simmons,* 379 U.S. 497, 514 (1965); *see also United States Trust,* 431 U.S. at 20 n.17. *See generally Baltimore Teachers Union,* 6 F.3d at 1017-18 and n.7. When assessing whether there has been the requisite reliance, the Court has looked to objective evidence of reliance.[9]

For example, the Court has examined the terms of the original contract to determine whether the contract - either explicitly or implicitly - indicated that the abridged

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[9] This is one of the reasons why the cities' reliance on the affidavit of an officer of a bondholder that his organization "expected to receive, and did in fact receive, the covenants and promises of [the cities] to place and enforce liens for unpaid sewer charges upon all premises served by the cities' sewer systems" is misplaced. The officer's affidavit does not state that his organization actually relied on or was induced by the lien provision in purchasing the bonds, let alone that the provision was central or important to its purchase of the bonds; indeed, the affidavit does not even indicate that the officer has personal knowledge as to his organization's general "expectations."

term was subject to impairment by the legislature. *See Richmond Mortgage & Loan Corp. v. Wachovia Bank & Trust Co.*, 300 U.S. 124, 130 n.6 (1937). Here, as noted above, the cities covenanted to collect charges for sewer service "to the full extent *permitted or authorized by the laws and the State, and the rules and regulations of the PSC*" (emphasis added). Accordingly, in the bond contracts it was expressly acknowledged that the cities' obligations to collect sewer charges and the bondholders' rights to have the cities collect these charges were subject to legislative authorization and regulation.

The Supreme Court has also directed that in assessing the parties' expectations, and so "determining the extent of the impairment, we are to consider whether the industry the complaining party has entered has been regulated in the past." *Energy Reserves,* 459 U.S. at 411; *Spannaus*, 438 U.S. at 242 n.13. "[P]ervasiveness of . . . prior regulation . . . suggests that absent some affirmative indication to the contrary the [complaining party] had no legitimate expectation that regulation would cease . . . ." *National R.R. Passenger Corp. v. Atchinson, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 469 (1985). The authority of the PSC to regulate the rates and practices of West Virginia municipalities, when acting as utilities, has existed at least since 1914. *See City of Benwood*, 83 S.E. at 296. The specific power of the PSC to regulate the extension, *Renick*, 116 S.E.2d at 770, and termination, *Chesapeake & Potomac Tel. Co. v. City of Morgantown,* 107 S.E.2d 489, 497 (W. Va. 1959), of service by a public utility to its customers is also well established. Thus, PSC regulation was "pervasive" and there was no reason for the cities and their bondholders to believe regulation would cease.[10]

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[10] In this regard, the cities' assertion that "[t]he PSC has never regulated the terms or enforcement of municipal bond covenants"

The Court has also examined *how* a contract has been changed, i.e., whether a covenant was abolished or "merely modified." *United States Trust*, 431 U.S. at 19. In *United States Trust*, an amendment to state law "totally eliminated" the state's prior promise that Port Authority revenues would be pledged to pay bondholders and, except for specified instances, not applied to future deficits of railway facilities, and so was found to constitute a substantial impairment. *Id.* The Court noted, however, that "a reasonable modification of statutes governing contract remedies is much less likely to upset expectations than a law adjusting the express terms of an agreement." *Id.* at 19 n.17. The 1990 amendment to § 8-18-23 only modifies the cities' right to impose liens on premises served, limiting that right to premises owned by the actual delinquent owners. The undisputed evidence before the district court on summary judgment was that the majority of sewer accounts in both cities involved owner-occupied premises (84% in South Charleston and 65% in Charleston). The challenged 1990 amendment would, of course, have no effect on collection efforts with regard to these accounts.

Finally, in determining the parties' reliance, the cases have focused on the character of the abridged right - whether it was by its nature "the central undertaking" or "primary consideration" of the parties. *City of El Paso*, 379 U.S. at 514. Thus, elimination of escalator clauses in natural gas contracts, *Energy Reserves*, 459 U.S. at 415-16; lowering the interest rate and delaying the maturity date

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misconceives the nature of the regulation in the present case. Neither the 1990 amendment nor the PSC's orders applying it are directed to altering the terms or remedies of bond contracts. Instead, they impose a generally applicable state policy, concerning when liens can be placed on properties and when services can be terminated or denied.

in bond contracts, *Faitoute Iron & Steel Co. v. City of Asbury Park*, 316 U.S. 502, 504 (1942); and elimination of the unlimited right to reinstate ownership of land after default, *City of El Paso*, 379 U.S. at 515, have been held not to constitute substantial impairments of contract rights, in part because the rights abridged were not in their nature essential to the underlying contract. In contrast, statutes causing "a fundamental change" in a pension contract, *Spannaus*, 438 U.S. at 246; repealing a statutory covenant, the purpose of which "was to invoke the constitutional protection of the Contract Clause as security against repeal," *United States Trust*, 431 U.S. at 18; and unilaterally modifying a contract right upon which the parties "especially" relied, i.e., "the right to compensation at the contractually specified level" in a public employment contract, *Baltimore Teachers Union*, 6 F.3d at 1018, have been held substantial impairments because the rights impaired by subsequent legislation were "important," *U.S. Trust*, 431 U.S. at 19, "basic," *Spannaus*, 438 U.S. at 246, and "central," *Baltimore Teachers Union*, 6 F.3d at 101, to the underlying contract. The modification of the bond contracts here so that one remedy - the right to impose liens - was removed as to one relatively small group simply does not constitute a right similarly "important," "basic," or "central." Like the Court in *City of El Paso*, "[w]e do not believe it can seriously be contended that the [bondholders were] substantially induced to enter these contracts" on the basis of the right abridged by subsequent legislative amendment. *City of El Paso*, 379 U.S. at 514.

To recapitulate, in determining the parties' expectations and actual reliance on the abridged contractual term, the Supreme Court has looked to several objective factors. Here each of these factors indicate that the 1990 amendment did not constitute a substantial impairment of the bond contracts. The bond contracts themselves contain express acknowledgments that the parties' rights were

subject to legislative regulation; there was a long established precedent of extensive state regulation of public utilities; the contracts were not abolished but merely modified; and the abridged right is, by its nature, not one central to the parties' undertaking.

Moreover, there is one further indication that the alleged impairment was not substantial. In addition to assessing the parties' expectations and actual reliance on the abridged contractual term, the Supreme Court has also directed that, in determining whether there has been a substantial impairment, a court should determine whether the abridged right was "replaced by an arguably comparable security provision." *United States Trust,* 431 U.S. at 19. This is so because "[t]he particular remedy existing at the date of contract may be altogether abrogated if another equally effective for the enforcement of the obligations remains or is substituted for the one taken away." *Richmond Mortgage & Loan Corp.,* 300 U.S. at 128-129. "The parties may rely on the continued existence of adequate statutory remedies for enforcing their agreement, but they are unlikely to expect that state law will remain entirely static." *United States Trust,* 431 U.S. at 21 n.17. In *United States Trust,* upon which the cities so heavily rely, no substitute security - of any kind - had been afforded the bondholders.

In contrast, the PSC argues that in this case "the Legislature in 1989, provided the utilities with a far more effective remedy to insure the payment of sewer bills by providing that customers' water service can be terminated for failure to pay such bills," and that the district court erred in failing to "consider the impact of the substituted remedy." In support of this claim, the PSC submitted uncontroverted evidence that after enactment of the 1989 amendment permitting the cities to require termination of water service to those with delinquent sewer bills,

Charleston's revenues from sewer service increased 4.7% and its accounts receivable decreased 44.7%, and South Charleston's revenues increased 29.3%, and its accounts receivable decreased 4.2%.

The cities contend that it was proper for the district court to ignore the effect of this new remedy because "[t]he water service termination provision [w]as enacted in 1989, [and] the elimination of rental property liens was enacted in 1990," and so, they claim, the former cannot be regarded as a replacement for the latter. We cannot agree. The Supreme court has never suggested that the comparable remedy must be enacted *at the same time* that the original remedy is modified. The critical date is that on which the contracts were entered into. The cities do not claim that when they entered into the bond contract they had the power to have water service terminated to delinquent sewer bill customers; they now have that power. Thus, although their enforcement power has been modified by the 1990 amendment, the cities have been supplied with another effective security provision in the 1989 amendment. Indeed, there was ample uncontroverted evidence that the 1989 termination provision is a far more effective collection remedy than the lien on rental property that was eliminated in 1990.

IV

In sum, assuming the cities have standing to pursue their Contract Clause claim, if the bond contracts were impaired at all by the 1990 amendment to W. Va. Code § 8-18-23, that impairment was clearly insubstantial. There was no violation of the Contract Clause.[11] Accordingly, the judgment of the district court is reversed, and the case

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[11] In view of our decision as to the Contract Clause claim, we need not reach the PSC's alternative arguments.

is remanded for entry of summary judgment in favor of the Public Service Commission of West Virginia.

REVERSED AND REMANDED

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON DIVISION

THE CITY OF CHARLESTON, and
THE CITY OF SOUTH CHARLESTON,

Plaintiffs,

v. Civil Action No. 2:93-0161

THE PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA; BOYCE GRIFFITH,
Chairman; OTIS D. CASTO, Commissioner;
and RICHARD D. FRUM, Commissioner,

Defendants.

MEMORANDUM OPINION

The plaintiffs in this case contend that a 1990 statutory amendment eliminating landlord liens for nonpayment of sewer bills and certain orders of the defendants implementing the amended statute violate the Contract Clause of the United States Constitution. Both parties have filed motions for summary judgment with supporting memoranda and the Sanitary Board of Bluefield

has, at the leave of the court, filed an amicus curiae brief in support of the plaintiffs' motion.

I.

Under authority granted to them by Chapter 16, Article 13 of the West Virginia Code, the plaintiffs in this case have issued, and currently have outstanding, certain sewer revenue bonds. The various sewer revenue bonds "constitute binding contractual obligations of the Cities to the various purchasers of the bonds, granting to those purchasers security interests for the protection of their investments, and certain rights and remedies relating thereto." (Complaint, ¶ 13.) Under West Virginia law, the provisions of Chapter 16, Article 13 form a part of the sewer revenue bond contracts, as if written verbatim into the bonds.[12] Brewer v. City of Point Pleasant, 114 W.Va. 572, 172 S.E. 717 (1934). Thus, included in the various bond contracts is a provision of W. Va. Code, 16-13-6 which provides in part that "[a]ll such rates or charges, if not paid when due, shall constitute a lien upon the premises served by such works. . . ." Accordingly, under this statutory provision liens could be placed on property due to delinquent sewer bills incurred by tenants of rental property.

In 1989, W. Va. Code, 8-18-23, the statute dealing with nonpayment and delinquency of sewer service charges, was amended to allow sewer utilities to insist upon the termination of water service provided by a utility other

[12] Article 13 of Chapter 16 of the West Virginia Code is entitled "Sewage Works of Municipal Corporations and Sanitary Districts."

than the sewer utility to customers with a delinquent sewer bill. Then effective June 9, 1990, W. Va. Code, 8-18-23 was amended as follows:

> Provided, That an owner of real property may not be held liable for the delinquent rates or charges for services or facilities of a tenant, nor shall any lien attach to real property for the reason of delinquent rates or charges for services or facilities of the tenant of such real property, unless the owner has contracted directly with the municipality to purchase such services or facilities.[13]

In Count I of their complaint, the plaintiffs allege that the 1990 amendment eliminating liens against landlords and two orders of the Public Service Commission (hereinafter "PSC") applying the statutory amendment[14]

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[13] Prior to the 1990 amendment, W. Va. Code, 18-8-23 read: (b) Whenever any rates and charges for services or facilities furnished remain unpaid for a period of thirty days after the same become due and payable, the property and the owner thereof, as well as the user of the services . . . shall be delinquent and the owner, user and property shall be held liable at law . . . . (c) All rates and charges whenever delinquent, as provided by ordinance of the municipality, shall be liens . . . upon the real property served, and the municipality shall have plenary power and authority from time to time to enforce such lien in a civil action to recover the money due . . . ."

[14] The Public Service Commission orders in question are the Copley order and the Moore order, both entered on March 30, 1992. Those orders involved ten different complaint cases filed at the PSC by landlords and tenants against the Sanitary Board of the City of Charleston. In those orders, the PSC held that the 1990 amendment ended property owner responsibility unless the owner contracted directly for the service.

violate the Contract Clause, U. S. Const., Art. I, § 10, cl. 1.[15] Specifically, the plaintiffs allege that as a result of the amendment and the Moore and Copley orders, "the ability of the Cities to meet their obligations under their sewer revenue bonds has been directly and severely impaired, and the security of bondholders has been lessened." (Complaint, Count I, ¶ 35.) The plaintiffs also allege that the actions of the Public Service Commission are in violation of 42 U.S.C. § 1983 (Complaint, Count II, ¶ 45), and that the actions of the defendants constitute an impairment of contract in violation of Article III, Section 4 of the West Virginia Constitution which provides in part that "No . . . law impairing the obligation of a contract, shall be passed." (Complaint, Count III, ¶ 50.) The plaintiffs allege that the 1990 amendment to W. Va. Code, 8-18-23 and the Moore and Copley orders "constitute an impairment of the contracts between the Cities and their sewer revenue bondholders."

The plaintiffs seek declaratory relief as well as injunctive relief prohibiting the defendants from interfering in the placement of liens for unpaid sewer service bills on property occupied by renters, and attorney's fees and costs.

II.

Rule 56(c), Federal Rules of Civil Procedure, provides that summary judgment shall be rendered forthwith if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the

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[15] "No State shall . . . pass any . . . Law impairing the Obligation of Contracts. . . ."

affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The moving party for summary judgment has the burden to show initially the absence of a genuine issue concerning any material fact. Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970). However, once a moving party has met its initial burden, the burden shifts to the non-moving party to "establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). To meet this burden, the non-moving party cannot rely on its pleadings, but instead must proffer evidence showing there is a genuine issue for trial. In order to create a triable issue there must be sufficient evidence favoring the non-moving party for a jury to return a verdict for that party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). If there is not, then summary judgment should issue.

III.

"Although the language of the Contract Clause is facially absolute, its prohibition must be accommodated to the inherent police power of the State 'to safeguard the vital interests of its people.'" Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400, 410 (1983), quoting Home Bldg. & Loan Ass. v. Blaisdell, 290 U.S. 398 (1934).

In Energy Reserves, the Court set out the appropriate Contract Clause standard. "The threshold inquiry is whether the state law has, in fact, operated as a substantial impairment of a contractual relationship."

Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 244 (1978). "The severity of the impairment is said to increase the level of scrutiny to which the legislation will be subjected." Id. at 17.

If the court finds that there has been a substantial impairment, the State must have a significant and legitimate public purpose behind the law to justify it, United States Trust Co., 431 U.S. at 22, such as the remedying of a broad and general social or economic problem.[16] Once a legitimate public purpose has been identified, the inquiry becomes whether the adjustment of the rights and responsibilities of contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the legislation's adoption. Id. at 22.

In support of their argument that the amended statute impairs their contracts with their bondholders, the plaintiffs rely on United States Trust Co. v. New Jersey, 431 U.S. 1 (1977), in which the Court held that New Jersey could not retroactively alter a statutory bond covenant.

In this case, the court finds that there has indeed been a substantial impairment of the contractual relationship between the plaintiffs and their bondholders. Specific provisions of bond ordinances attached to the complaint show that provisions relating to the placement of

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[16] As the Court stated in Energy Reserves, the requirement of a legitimate public purpose guarantees that the State is exercising its police power, rather than providing a benefit to special interests. 459 U.S. at 412.

liens on property for delinquent sewer bills are present in all of the ordinances. These provisions have, in effect, been repealed by the 1990 amendment to W. Va. Code, 8-18-23. Although the defendants have presented evidence that the elimination of landlord liens has had no negative impact upon the plaintiffs' revenues and their obligations as set forth in the bond agreements,[17] the Contract Clause speaks of the impairment of the "obligation of a contract" not the impairment of the performance of a contract. Although the plaintiffs are able to meet their bond obligations at present, they may not be able to do so in the future. Thus, whether the plaintiffs are able to pay bondholders is not the critical issue here. The plaintiffs had explicit contractual agreements with their bondholders to place liens on "premises served" when bills are not paid. The statutory amendment obliterating this agreement is a substantial impairment of it.

Having found a substantial impairment, the court must now determine whether the State has a significant and legitimate public purpose behind the law to justify it such as the remedying of a broad and general social or economic problem. The answer to this question is clear: there is no legitimate public purpose behind the elimination of the liens against landlords. The amendment was simply a piece of special interest legislation introduced on behalf of landlords for the benefit of the landlords. (See Deposition of George Farley, pp. 8-10.) The lien provisions relating to owner-occupied premises remained in effect, as did the provisions

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[17] The City of Charleston is required to have debt coverage of 110% and has debt coverage of 136.46%. The City of South Charleston is required to have debt coverage of 115% and has debt coverage of 133.12%. (Affidavit of Birdie Gandy.)

relating to premises served by public service district sewer systems.

Having found a substantial impairment of the plaintiffs' contracts with their bondholders and having found that no legitimate public purpose is served by the 1990 statutory amendment, the court need not proceed further in its analysis of the Contract Clause issue.

Plaintiffs further assert that the defendants, by their actions, have violated 42 U.S.C. § 1983, which in pertinent part provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Defendants counter that the allegations of plaintiffs herein do not fall within the scope of § 1983.

The issue thus raised involves a determination of the scope and purpose of § 1983. It is pertinent to note that it is to be broadly and liberally construed.

The Court is of the opinion that the defendants herein are in violation of § 1983 in view of the obvious purpose of the statutory enactment. The acts of defendants fit squarely within the prohibitions imposed by § 1983. As the Supreme Court of the United States observed in Dennis v. Higgins, a broad construction of § 1983 is compelled by the statutory language, which speaks of deprivations of "any rights, privileges or immunities secured by the Constitution and laws." See, Dennis v. Higgins, 498 U.S. 439.

Having fully considered the issues raised by the pleading, the memoranda of the parties in support of their motions and the argument of counsel, the Court is of the opinion to grant plaintiffs' motion for summary judgment and it is so ORDERED.

The Clerk is directed to mail copies of this Memorandum Opinion to counsel of record herein.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON DIVISION

THE CITY OF CHARLESTON, and
THE CITY OF SOUTH CHARLESTON,

Plaintiffs,

v. Civil Action No. 2:93-0161

THE PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA; BOYCE GRIFFITH,
Chairman; OTIS D. CASTO, Commissioner;
and RICHARD D. FRUM, Commissioner,

Defendants.

JUDGMENT ORDER

In accordance with the Memorandum Opinion of the Court filed herein, the Court finds and declares that:

1. The 1990 amendment to W. Va. Code § 8-18-23 constitutes an unconstitutional impairment of the obligations of the contracts between the Cities and their sewer revenue bondholders, in violation of Article I,

Section 10, Clause 1 of the Constitution of the United States;

2. The Public Service Commission's Orders in the Copley and Moore cases, attached to the Complaint as Exhibits F and G, interpreting and applying the amendment to W. Va. Code § 8-18-23, likewise unconstitutionally impair the contractual obligations of the Cities to their sewer revenue bondholders, in violation of Article I, Section 10, Clause 1 of the Constitution of the United States, and are, therefore, to the extent that they so rule, null and void;

3. The Public Service Commission of West Virginia may not prohibit or otherwise interfere with the efforts of the Cities to collect delinquent sewer charges from landlords for sewer service provided to their rental properties, including, but not limited to, placing statutory liens on such property;

4. The 1990 amendment to W. Va. Code § 8-18-23, and the Public Service Commission's Orders in Copley and Moore, constitute an unconstitutional impairment of the contracts between the Cities and their sewer revenue bondholders in violation of Article III, Section 4 of the Constitution of West Virginia;

5. The 1990 amendment to W. Va. Code § 8-18-23, and the Commission's rulings in Copley and Moore, deprive the Cities of rights, privileges and immunities secured to them by 42 U.S.C. § 1983;

6. And further, all defendants are enjoined and prohibited from any and all further interference with other lawful efforts of the Cities to collect such bills.

All matters herein having been concluded, it is hereby ORDERED that this civil action be dismissed from the docket of the Court.

The Clerk is directed to mail copies of this Judgment Order to counsel of record herein.

APPENDIX D

WEST VIRGINIA CODE

§ 8-18-23. Authority to require discontinuance of water service by provider utility for nonpayment of sewer service rates and charges; lien for delinquent service rates and charges; failure to cure delinquency; civil actions; deferral of filing fees and costs in magistrate court action; limitations with respect to foreclosure.

(a) When any municipality owns, maintains, operates or provides sewer facilities to its residents and customers and does not own, maintain, operate or provide water facilities to them when the same is provided by any other publicly or privately owned utility, municipality or public service district, the municipality providing sewer facilities may require the provider of water facilities to discontinue water service to any of its users who are delinquent in the payment of sewer service rates and charges to the municipality. The provider of water facilities is empowered and authorized hereby to discontinue water service upon demand of the municipality for this purpose; however, prior to discontinuance of any water service, the municipality shall contract with the provider of water facilities which contract shall provide that the municipality shall reimburse the provider of water facilities for all costs and expenses incurred in both the termination of water service to the delinquent user of sewer facilities and the subsequent resumption of water service to

such user. The contract shall provide for reasonable methods and assurances so that the provider of water facilities will be protected and held harmless from claims and damages when water service is discontinued in error or in violation of the rights of the user through the fault of the municipality providing sewer facilities and making the demand for discontinuance of water service to the user of such sewer facilities. Any contract made for this purpose shall have the approval of the public service commission prior to its execution and performance. Any disconnection of water service must comply with all rules, regulations and orders of the public service commission.

(b) Whenever any rates and charges for services or facilities furnished remain unpaid for a period of thirty days after the same become due and payable, the user of the services and facilities provided shall be delinquent and the user shall be held liable at law until such time as all such rates and charges are fully paid.

(c) All rates and charges whenever delinquent, as provided by ordinance of the municipality, shall, when notice thereof is duly recorded in the office of the clerk of the county commission wherein the subject real property is situate, be liens of equal dignity, rank and priority with the lien on such premises of state, county, school and municipal taxes for the amount thereof upon the real property served, and the municipality shall have plenary power and authority from time to time to enforce such lien in a civil action to recover the money due for such services rendered plus court fees and costs and a reasonable attorney's fee: Provided, That an owner of real property may not be held liable for the delinquent rates or charges

for services or facilities of a tenant, nor shall any lien attach to real property for the reason of delinquent rates or charges for services or facilities of a tenant of such real property, unless the owner has contracted directly with the municipality to purchase such services or facilities.

(d) Municipalities are hereby granted a deferral of filing fees or other fees and costs incidental to the bringing and maintenance of an action in magistrate court for the collection of the delinquent rates and charges. If the municipality collects the delinquent account, plus fees and costs, from its customer or other responsible party, the municipality shall pay to the magistrate court the filing fees or other fees and costs which were previously deferred.

(e) No municipality may foreclose upon the premises served by it for delinquent rates and charges for which a lien is authorized by this section except through the bringing and maintenance of a civil action for such purpose brought in the circuit court of the county wherein the municipality lies. In every such action, the court shall be required to make a finding based upon the evidence and the facts presented that the municipality had exhausted all other remedies for the collection of debts with respect to such delinquencies prior to the bringing of such action. In no event shall foreclosure procedures be instituted by any municipality or on its behalf unless such delinquency has been in existence or continued for a period of two years from the date of the first such delinquency for which foreclosure is being instituted. (1989, c. 133; 1990, c. 140.)

WEST VIRGINIA CODE

§ 16-13-16. Rates for service; change or readjustment; hearing; lien and recovery; discontinuance of services.

The governing body shall have power, and it shall be its duty, by ordinance, to establish and maintain just and equitable rates or charges for the use of and the service rendered by such works, to be paid by the owner of each and every lot, parcel of real estate or building that is connected with and uses such works by or through any part of the sewerage system of the municipality, or that in any way uses or is served by such works, and may change and readjust such rates or charges from time to time. Such rates or charges shall be sufficient in each year for the payment of the proper and reasonable expense of operation, repair, replacements and maintenance of the works and for the payment of the sums herein required to be paid into the sinking fund. Revenues collected pursuant to this section shall be deemed the revenues of the works. No such rates or charges shall be established until after a public hearing, at which all the users of the works and owners of property served or to be served thereby and others interested shall have an opportunity to be heard concerning the proposed rates or charges. After introduction of the ordinance fixing such rates or charges, and before the same is finally enacted, notice of such hearing, setting forth the proposed schedule of such rates or charges, shall be given by publication as a Class II-O legal advertisement in

compliance with the provisions of article three [§ 59-3-1 et seq.], chapter fifty-nine of this Code, and the publication area for such publication shall be the municipality. The first publication shall be made at least ten days before the date fixed in such notice for the hearing. After such hearing, which may be adjourned from time to time, the ordinance establishing rates or charges, either as originally introduced or as modified and amended, shall be passed and put into effect. A copy of the schedule of such rates and charges so established shall be kept on file in the office of the board having charge of the operation of such works, and also in the office of the clerk of the municipality, and shall be open to inspection by all parties interested. The rates or charges so established for any class of users or property served shall be extended to cover any additional premises thereafter served which fall within the same class, without the necessity of any hearing or notice. Any change or readjustment of such rates or charges may be made in the same manner as such rates or charges were originally established as hereinbefore provided: Provided, however, That if such change or readjustment be made substantially pro rata, as to all classes of service, no hearing or notice shall be required. The aggregate of the rates or charges shall always be sufficient for such expense of operation, repair and maintenance and for such sinking fund payments. All such rates or charges, if not paid when due, shall constitute a lien upon the premises served by such works. If any service rate or charge so established shall not be paid within thirty days after the same is due, the amount thereof, together with a penalty of ten percent, and a reasonable attorney's fee, may be recovered by the board in a civil action in the name of the municipality, and in connection with such action said lien may be foreclosed

against such lot, parcel of land or building, in accordance with the laws relating thereto: Provided, however, That where both water and sewer services are furnished by any municipality to any premises the schedule of charges may be billed as a single amount or individually itemized and billed for the aggregate thereof. Whenever any rates, rentals or charges for services or facilities furnished shall remain unpaid for a period of thirty days after same shall become due and payable, the property and the owner thereof, as well as the user of the services and facilities shall be delinquent until such time as all such rates and charges are fully paid. The board collecting such charges shall be obligated under reasonable rules and regulations, to shut off and discontinue both water and sewer services to all delinquent users of either water facilities, or sewer facilities, or both, and shall not restore either water facilities or sewer facilities to any delinquent user of either until all delinquent charges for both water facilities and sewer facilities, including reasonable interest and penalty charges, have been paid in full. (1933, Ex. Sess., c. 25, § 16; 1933, 2nd Ex. Sess., c. 48; 1959, c. 125; 1967, c. 105.)

APPENDIX F

AFFIDAVIT OF DANIEL B. YONKOSKY

STATE OF WEST VIRGINIA,
COUNTY OF KANAWHA, to-wit:

Daniel B. Yonkosky, being first duly sworn, deposes and says as follows:

1. That he is the Director of the West Virginia Water Development Authority, an agency of the State of West Virginia;

2. That the West Virginia Water Development Authority is the owner of certain sewer revenue bonds issued by the City of Charleston in March 1989, and in November 1989;

3. That the West Virginia Water Development Authority is the owner of certain sewer revenue bonds issued by the City of South Charleston in August 1986;

4. That, as part of the security for repayment of the money loaned to Charleston and South Charleston (hereinafter the "Cities") pursuant to the bonds mentioned in Paragraphs 2 and 3 of this Affidavit, the West Virginia Water Development Authority expected to receive, and did in fact receive, the covenants and promises of Charleston and South Charleston to place and enforce liens for unpaid

sewer charges upon all premises served by the Cities' sewer systems;

5. That the West Virginia Water Development Authority views the lien provisions of the bonds as important financial security provisions of the bond contracts;

6. That the prohibition of placement of liens for unpaid sewer charges on rental properties served by the Cities' sewer systems has deprived the West Virginia Water Development Authority of a substantial part of the means to ultimately collect the money that the Cities owe to it;

7. That, as a result of the prohibition of the placement of liens for unpaid sewer charges on rental properties served by the Cities, the bond contracts between the Cities and the West Virginia Water Development Authority have been substantially impaired;

And further Affiant sayeth naught.

/s/ Daniel B. Yonkosky

Taken, subscribed and sworn to before me, the undersigned authority, on this the 18th day of November, 1993.

My Commission expires: January 17, 1994.

/s/ Barbara B. Meadows

Notary Public

(NOTARIAL SEAL)

APPENDIX G

AFFIDAVIT OF WILLIAM B. COLLISON

STATE OF WEST VIRGINIA,
COUNTY OF KANAWHA, to-wit:

William B. Collison, being first duly sworn, deposes and says as follows:

1. That he is the Financial Manager of the Sanitary Board of the City of Charleston, and has held such position since January 1986.

2. That he is thirty-six years of age, and has resided in Kanawha County, West Virginia, since 1956.

3. That he was graduated from West Virginia State College in 1981, with a Bachelor of Science in Business Administration, majoring in accounting.

4. That from January 1981 until January 1986 he worked for American Water Works Service Company, where he was employed from January 1981 until June 1983 as a water utility rate analyst, and from June 1983 until January 1986 as a water utility senior internal auditor.

5. That as Financial Manager of the Charleston Sanitary Board, he has overall responsibility for all financial matters involving the Sanitary Board, including, but not limited to, billing, collecting, placing and enforcing liens for delinquent sewer charges on various premises served, preparation of financial statements, preparation and

calculation of projected and actual figures for revenue, expenses, and delinquent accounts.

6. That he is familiar with the history of the Sanitary Board's level of delinquent accounts since January 1986.

7. That he has made an examination of the Sanitary Board's service accounts, of which there are 24,047, and has determined:

(a) That 8,303 (34.5%) of such accounts are for service to rental properties;

(b) That 1,651 of total accounts are delinquent in payment for services rendered;

(c) That 1,210 (73.3%) of the 1,651 delinquent accounts are rental property accounts;

(d) That rental property accounts have a delinquent rate of 14.6%.

(e) That owner-occupied accounts have a delinquent rate of 2.8%.

(f) That an account is considered "delinquent" if a bill is unpaid for sixty days;

(g) That the figures stated in this paragraph were derived from the computerized accounting records of the Sanitary Board by comparing the name in which the service is being billed against the name of the owner of the property. If the names are different, the property is considered to be rental property.

8. That the bond ordinances, attached to the Complaint in Civil Action No. 2:93-0161, now pending in the U.S. District Court for the Southern District of West Virginia, as Exhibits A and B, are:

(a) True and accurate copies of the bond ordinances adopted by the City Council of the City of Charleston, West Virginia;

(b) Issued and outstanding bonds, not having been paid;

(c) Valid contractual obligations between the City of Charleston and the various purchasers of said bonds;

(d) Required to be paid only from revenues generated by the City of Charleston's sewer system operations;

(e) Secured only by a pledge of revenues and by the City's obligation to place and enforce liens on premises served by the sewer system if bills for rates and charges to such premises are not paid.

9. That sewer service is provided to "premises," that is, to discrete physical locations on identified real estate, not to individuals.

10. That sewer service is unlike other utility services in that:

(a) No commodity is provided, as in the case of water, gas, or electric utility service, which could be withheld for non-payment;

(b) No easily withdrawn service is provided, as in telephone utility service;

(c) Once any particular premises are connected to the sewer system, those premises may not, and, in most cases, cannot, be disconnected, even if bills are unpaid.

11. That the Sanitary Board is affirmatively obligated, by both the bond contracts and by West Virginia statute, to place liens on all premises served by the sewer system, when bills for such services are unpaid.

12. That the placing of liens on premises served by the sewer system is one of the most effective methods available to the Sanitary Board to collect delinquent accounts.

13. That the Charleston Sanitary Board operates the sewer systems of Mt. Tyler Public Service District and Guthrie Public Service District, and such operations include, but are not limited to, billing, collecting, and the placing and enforcement of liens on premises served by such sewer systems for unpaid bills.

14. That, based on his experience in supervising the financial aspects of Mt. Tyler Public Service District and Guthrie Public Service District, there is no difference between said Districts' sewer systems and Charleston's sewer system, in the following respects:

(a) The economic and social characteristics of the various areas served, and the persons residing therein, are similar;

(b) There is no broad general social, economic or other societal problem that exists in the

areas served by Charleston's sewer system, that does not equally exist in areas served by the District's sewer systems;

(c) Prior to the enactment of the 1990 Amendment to W. Va. Code 8-18-23(c), the delinquency rates for the Districts' sewer systems and Charleston's sewer system were similar.

15. That the West Virginia Legislature's 1990 Amendment of W. Va. Code § 8-18-23(c), as interpreted and applied by the Public Service Commission of West Virginia, prevents Charleston from placing liens for unpaid sewer charges on rental premises served, while public service districts retain the ability to place liens on rental premises.

16. That the City of Charleston's bond contracts place upon the City the obligation to place liens for unpaid sewer charges on all premises served.

17. That he is aware of no broad, general social, economic or other societal problem in Kanawha County, West Virginia, that would apply to or affect rental property receiving sewer service, that would not also equally apply to or affect owner-occupied property receiving sewer service.

18. That the primary beneficiaries of the prohibition of sewer liens on rental property are owners of rental properties.

19. That if the Public Service Commission of West Virginia had not issued its March 30, 1992, Orders in Copley v. Charleston Sanitary Board (PSC Case No. 90-518-S-C) and Moore v. Sanitary Board of the City of

Charleston (PSC Case No. 91-120-S-C), the Charleston Sanitary Board would have continued to place liens for unpaid sewer charges on rental properties, and would have continued to use every lawful means available to collect unpaid sewer charges from all those liable, including owners of rental properties.

20. That the prohibition of the placement of liens for unpaid sewer charges on rental properties served by its sewer system is a serious and substantial impairment of Charleston's obligations to its bondholders.

And further Affiant sayeth naught.

/s/ William B. Collison

Taken, subscribed and sworn to before me, the undersigned authority, on this the 18th day of November, 1993.

My Commission expires May 19, 2003.

/s/ Grace M. Wagner

Supreme Court, U.S.
FILED
OCT 10 1995
CLERK

No. 95-375

In The

Supreme Court of the United States

October Term, 1995

THE CITY OF CHARLESTON and THE CITY OF SOUTH CHARLESTON,

Petitioners,

v.

THE PUBLIC SERVICE COMMISSION OF WEST VIRGINIA; BOYCE GRIFFITH, Chairman; OTIS D. CASTO, Commissioner; RICHARD D. FRUM, Commissioner,

Respondents.

On Petition for Writ of Certiorari To The United States Court of Appeals For the Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

RICHARD E. HITT
201 Brooks Street
Post Office Box 812
Charleston, WV 25323
(304) 340-0317

Attorney for Respondents

QUESTIONS PRESENTED

1. Did a 1990 Act of the West Virginia Legislature and 1992 orders of the Public Service Commission of West Virginia, a state regulatory agency responsible for regulating the practices and services of public utilities, violate the Contract Clause concerning contracts between the City Petitioners, public utilities that provide sewer service, and their bondholder?

2. Was it appropriate for the Fourth Circuit to direct summary judgment for the Respondent, Public Service Commission?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 7

ARGUMENT 8

I. THE FOURTH CIRCUIT CORRECTLY APPLIED THE LAW IN CONSIDERING THE IMPAIRMENT QUESTION 8

II. THERE IS NO CONFLICT OF LAW AS A RESULT OF THE DECISION 10

III. THE FOURTH CIRCUIT PROPERLY APPLIED THE LAW IN ANALYZING THE MOTIONS FOR SUMMARY JUDGMENT. 19

IV. THE COMPLAINT COULD HAVE BEEN PROPERLY DISMISSED NOTWITHSTANDING THE IMPAIRMENT ISSUE 23

CONCLUSION 24

APPENDIX A1

TABLE OF AUTHORITIES

PAGE

CASES

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 91 L.Ed.2d 202, 106 S.Ct. 2505 (1986) 20, 21

Baltimore Teachers Union v. Mayor, etc. of Baltimore, 6 F.3d 1012 (4th Cir. 1993), *rehg. den., cert. denied*, 114 S.Ct. 1127, 127 L.Ed.2d 435 (1994) 14

Bumgarner v. Joe Brown Company, Inc., 376 F.2d 749, 750 (10th Cir. 1967), *cert. denied*, 389 U.S. 831, 19 L.Ed.2d 90, 88 S.Ct. 99 (1967)) 22

Caritas Services, Inc. v. Department of Social and Health Services, 123 Wash.2d 391, 869 P.2d 28 (1994) 18

Celotex Corp. v. Catrett, 477 U.S. 317, 91 L.Ed. 2d 265, 106 S.Ct. 2548 (1986) 20, 21, 22

City of Benwood, et al. v. Public Service Commission, 75 W.Va. 127, 83 S.E. 295 (1914) 2, 9

City of Charleston v. Public Service Commission, 86 W.Va. 536, 103 S.E. 673 (W.Va. 1920) 9

City of Charleston v. Public Service Commission, 57 F.3d 385 (4th Cir. 1995) ..... 1, passim

Continental Ill. Nat. Bank, etc. v. State of Washington, 696 F.2d 692 (9th Cir. 1983), *appeal dismissed*, 460 U.S. 1077, 103 S.Ct. 1762, 76 L.Ed.2d 338 (1983), *rehg. den.* 461 U.S. 950, 103 S.Ct. 2130, 77 L.Ed.2d 1309 (1983) 15, 16

Delardes v. Morgantown Water Commission, 148 W.Va. 776, 137 S.E.2d 426 (W.Va. 1964) 9

George D. Hardin v. The Village of Mount Prospect, 99 Ill. 2d 96, 457 N.E.2d 429 (1983) 18

Holiday Inns Franchising, Inc. v. Branstad, 29 F.3d 383 (8th Cir. 1994), *cert. den.* 115 S.Ct. 613, 130 L.Ed.2d 522 (1994) 16

TABLE OF AUTHORITIES – Continued

Page

CASES:

John Hopkins University v. Hutton, 297 F.Supp. 1165, 1201 (Dist. of Md. 1968), *rev'd. in part, aff'd. in relevant part*, 422 F.2d 1124 (4th Cir. 1970) 22

M&M Medical Suppliers v. Pleasant Valley Hospital, 981 F.2d 160, 163 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 2962, 125 L.Ed.2d 662 (1993) 22

Matsushita Elec. Co. v. Zenith Radio, 475 U.S. 574, 89 L.Ed.2d 538, 106 S.Ct. 1348 (1986) 20

New Jersey Highway Authority v. Sills, 109 N.J. Super, 424, 263 A.2d 498 (Ch. Div. 1970), *supp. opinion*, 111 N.J. Super, 313, 268 A.2d 308 (Ch. Div. 1970), *affirmed* p.c.o.b., 58 N.J. 432, 278 A.2d 489 (1971) 17

Patterson v. Carey, 41 N.Y.2d 714, 363 N.E.2d 1146 (1977) 17

Pocahontas Supreme Coal Co. v. Bethlehem Steel, 828 F.2d 211 (4th Cir. 1987) 22

State of Nevada Employees Assoc., Inc. v. Keating, 903 F.2d 1223 (9th cir. 1990), *cert den.*, 498 U.S. 999, 111 S.Ct. 558, 112 L.Ed.2d 565 (1990) 16

State v. Renick, 145 W.Va. 640, 116 S.E.2d 763 (W.Va. 1960) 9

United States Trust v. New Jersey, 431 U.S. 1, 52 L.Ed.2d 92, 97 S.Ct. 1505, *reh'g. den.* 431 U.S. 975, 53 L.Ed.2d 1073, 97 S.Ct. 2942 (1977) ..... 8, 10, passim

Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472, 70 L.Ed.2d 700, 102 S.Ct. 752 (1982) 23

TABLE OF AUTHORITIES – Continued

Page

ADMINISTRATIVE CASES

Copley v. Charleston Sanitary Board, PSC Case No. 90-518-S-C 4, 5, 7

Moore, et al. v. Charleston Sanitary Board, PSC Case No. 91-120-S-C, et al. 4, 5, 7

STATUTES

West Virginia Code:
§8-18-23 ..... 2, 3, 4, 5, 6
§8-18-23(a) 5, 6
§8-20-10 5
§16-13-16 5
§22C-1-1 9
§24-1-1 2
§24-2-1 2
§24-2-2 3
§24-2-7 3
§24-3-1. 4
§24-4-6 3
§24-5-1 7

RULES

Rule 4.08 of the Commission's *Rules and Regulations for the Government of Water Utilities*, 150 CSR 7, Rule 4.8.3 ..... 5, 6

Rule 56 of the *Federal Rules of Civil Procedure* ..... 20, passim

No. 95-375

In The

Supreme Court of the United States

October Term, 1995

THE CITY OF CHARLESTON and THE CITY OF SOUTH CHARLESTON,

Petitioners,

v.

THE PUBLIC SERVICE COMMISSION OF WEST VIRGINIA; BOYCE GRIFFITH, Chairman; OTIS D. CASTO, Commissioner; RICHARD D. FRUM, Commissioner,

Respondents.

On Petition for Writ of Certiorari To The United States Court of Appeals For the Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

The Respondents, Public Service Commission of West Virginia, Boyce Griffith, Chairman, Otis D. Casto, Commissioner, and Richard D. Frum, Commissioner, (the "Public Service Commission" or "PSC" or "Commission") respectfully request that this Court deny the petition for writ of certiorari which seeks review of the Fourth Circuit's opinion below, *City of Charleston v. Public Service Commission*, 57 F.3d 385 (4th Cir. 1995) and reprinted in the petition for certiorari at Appendix A.

STATEMENT OF THE CASE

The sewage collection and treatment operations of the City of Charleston and the City of South Charleston, (the "Petitioners" or "Cities") acting through their sanitary boards, constitute a public utility service which is subject to the regulation of the Commission. *West Virginia Code* §§24-1-1 and 24-2-1. Such regulation of the practices and services of the Cities has existed since the inception of the sewer systems.[1]

In order to fund improvements to their sewer collection and treatment facilities, the Cities enacted certain bond ordinances to enable the issuance of bonds. These ordinances have been held to be contracts. All of the ordinance contracts which contain language dealing with the collection of delinquent sewer bills, which includes the denial and termination of service, specifically acknowledge that such activities are subject to legislative and regulatory oversight. The contracts provide for such activities "to the full extent permitted or authorized by the laws of the State, and the Rules and Regulations of the PSC."

In 1989, the West Virginia Legislature ("Legislature") amended *West Virginia Code* §8-18-23 to allow sewer utilities, such as the Cities, to insist upon the termination of water service, when the water service was provided by a utility other than the sewer utility, to customers with a delinquent sewer bill. By the amendment, the Legislature provided the Cities with an extremely important mechanism to assist in the collection of their delinquent sewer bills. In 1989, shortly after the Legislature's action, both South Charleston and Charleston entered into contracts with West Virginia-

[1]The West Virginia Supreme Court of Appeals has recognized the authority of the Public Service Commission to regulate the utility practices and services of municipalities since at least 1914 regardless of contractual arrangements entered into by the utility. See, *City of Benwood, et al. v. Public Service Commission*, 75 W.Va. 127, 83 S.E. 295 (1914).

American Water Company ("West Virginia-American"), which were approved by the PSC in 1989, that requires West Virginia-American, upon the Cities' demand, to terminate water service because of delinquent sewer bills. West Virginia-American is the utility providing water service within the Cities' service territories. The effect of the 1989 legislation and its impact upon the ability of the Cities to collect their accounts receivable was analyzed by the PSC and submitted in its summary judgment affidavits. One of those affidavits is attached as Appendix B. Contrary to the assertion of the Cities, this analysis was not concerned with only the overall financial condition of the Cities. The evidence was submitted to illustrate the effectiveness of the alternative remedy provided to the Cities in collecting certain bills. As noted by the Fourth Circuit, the undisputed evidence shows that following enactment of the legislation, revenues increased and accounts receivable decreased. 57 F.3d at 394.

A year later, in 1990, the Legislature again amended *West Virginia Code* §8-18-23 by removing the provisions allowing liens to be placed on premises occupied by tenants who were sewer customers with delinquent sewer bills. The legislation also removed the property owner responsibility for delinquent sewer bills incurred by tenants.[2] The result of the 1990 amendment is that the person who contracts for the utility service should be responsible for its payment.

In 1990 and 1991, the Commission received numerous formal complaints by landlords and tenants against the Sanitary Board of the City of Charleston ("Charleston")[3]. The complaints alleged that contrary to the 1990 legislative

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[2]If property owners contract directly with the Cities for sewer service, they remain responsible for the payment of bills.

[3]The Complaints were filed pursuant to *West Virginia Code* §24-4-6. *West Virginia Code* §24-2-2 directs the Public Sewer Commission to require public utilities to conform to the laws of the State and to the Rules and Regulations of the Commission. Following the PCS's investigation, *West Virginia Code* §24-2-7 allows the Commission to fix reasonable practices to be followed by the public utility in lieu of those found to be unreasonable or discriminatory.

action, Charleston was still holding landlords financially responsible for the delinquent sewer bills incurred by tenants. In one of the cases, service was terminated to a landlord because of a prior tenant's delinquent sewer bill. The tenants complained that the Charleston was denying service to tenants solely because of an outstanding delinquent sewer bill incurred by another.[4]

On March 30, 1992, the Commission issued two orders in the consolidated formal complaint cases. *Copley v. Charleston Sanitary Board*, PSC Case No. 90-518-S-C, and *Moore, et al. v. Charleston Sanitary Board*, PSC Case No. 91-120-S-C, et al. The Commission's orders held that the 1990 amendment to West Virginia Code 8-18-23 ended property owner responsibility for delinquent sewer bills unless the property owners had directly contracted for the service. This was nothing more than a restatement of what the Legislature had provided in 1990 when it amended the Code section. Furthermore, applying Commission rules and regulations and applicable State law, the Commission determined that the City could not deny sewer service to tenants that applied for service or terminate service to tenants who had no connection with the previous delinquency. This holding was based on long established policy incorporated in rules and regulations of the Commission which has been uniformly applied to all providers of utility service. The applicable rule is attached as Appendix A. To deny utility service to tenants would constitute a discriminatory practice prohibited by *West Virginia Code* §24-3-1. Furthermore, the denial of essential utility service to innocent third parties, because of another's delinquent bill, is manifestly unreasonable and discriminatory. *West Virginia Code* §24-3-1.

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[4]The Petitioner, The City of South Charleston, was not a party to the complaints filed at the PSC.

In the *Copley* case, filed August 1990, the issue before the Commission was not the lien provisions of *West Virginia Code* §8-18-23 (as alleged by the Cities) but whether utility service had been wrongfully terminated to a landlord. The landlord's service was terminated because of delinquent sewer bills owed by previous tenants of his property. The Commission rejected Charleston's argument that *West Virginia Code* §16-13-16 gave the Sanitary Board the right to terminate the landlord's service. The Commission found that *West Virginia Code* §16-13-16 only applied to municipals that provided both water and sewer service, not municipals, like Charleston, that provide only sewer service. Similarly, the Commission rejected Charleston's arguments that *West Virginia Code* §8-20-10 allowed the termination of sewer service because that *Code* provision also only applied to municipals with combined water and sewer systems. The Commission found that the provisions of *West Virginia Code* §8-18-23(a) would allow termination of service to delinquent *users* (who were the customers, the tenants) not termination of service to property owners.

Finally, the Commission held that Rule 4.08 of its *Rules and Regulations for the Government of Water Utilities*, 150 CSR 7, Rule 4.8.3., prevented the termination of service to the landlord because the rule provides that a delinquency in payment for service by a previous occupant is insufficient cause for refusing, denying or discontinuing service unless the new customer was a member of the same household.[5]

The *Moore* case represented consolidated complaints by both landlords and tenants which presented the issues of whether landlords could be held responsible for the debt of a tenant and whether utility service could be denied to tenants and landlords because of a delinquent

[5]The relevant portion of Rule 4.08 appears in Appendix A to this brief.

sewer bill incurred by another. The Commission held that the provisions of *West Virginia Code* §8-18-23 prohibited Charleston from holding the property owner liable for tenants' delinquent service bills, unless the landlords had contracted with the Sanitary Board for the service which was provided. This finding is the literal interpretation of the 1990 legislation.

The Commission found that denial of service to landlords and tenants because of delinquencies of former occupants was contrary not only to the express provisions of *West Virginia Code* §8-18-23(a) but also Rule 4.08 of the *Rules and Regulations for the Government of Water Utilities* (like the *Copley* decision).

Finally, the Commission rejected Charleston's argument that the Commission's findings concerning denial of service to landlords and tenants unconstitutionally impaired Charleston's bond contracts. The Commission emphasized that Charleston's denial of service was a utility practice which was properly regulated by the Commission. The Commission found Charleston's practice to be contrary to the express provisions of *West Virginia Code* §8-18-23 and Rule 4.08 of the Commission's *Rules and Regulations for the Government of Water Utilities* and to constitute an undue burden to citizens seeking to rent apartments within Charleston. In other words, the PSC was regulating utility practices, not provisions of a contract, which regulation is contemplated and acknowledged by the express terms of the contracts in this case. Thus when Petitioners complain that the contemplated regulation never extended to municipal bond covenants, they are mischaracterizing the nature of the regulation. Neither the state nor the PSC has undertaken to regulate the Cities' contracts or covenants. The State has undertaken to establish policy throughout the State by enactment of the statute and the PSC has undertaken to regulate a utility's practices and services to its customers.

West Virginia Code §24-5-1 provides the procedure for judicial review of orders of the Commission. Pursuant to that section, the City of Charleston could have appealed the *Copley* and *Moore* orders to the West Virginia Supreme Court of Appeals. Charleston did not file an appeal of the Commission's orders with the State Supreme Court.

Instead of appealing to the State Supreme Court, the Cities filed their complaint in Federal District Court on February 24, 1993 alleging that the 1990 legislation and the 1992 orders violated the Contracts Clause to the State and Federal Constitutions. Acting pursuant to the District Court's procedural order, both the Cities and the Public Service Commission filed motions for summary judgment. The District Court granted judgment in favor of the Cities and found that the 1990 Legislation and the 1992 orders of the Commission violated the Contract Clause to the Federal and State constitutions.

On review, the Fourth Circuit reversed and remanded the case to the District Court for entry of summary judgment in favor of the Public Service Commission. The Fourth Circuit found that if the bond contracts were impaired at all, that impairment was clearly insubstantial and there was no violation of the Contract Clause. 57 F.3d at 395.

SUMMARY OF ARGUMENT

There are no pressing or unresolved legal issues in this case. The Fourth Circuit applied appropriate legal standards in analyzing the Contract Clause issue. Furthermore, the Fourth Circuit appropriately directed summary judgment in favor of the Public Service Commission. Finally, regardless of the impairment issue, there exist other legal reasons justifying judgment in favor of the Public Service Commission. The decision of the Fourth Circuit is plainly right.

ARGUMENT

I. THE FOURTH CIRCUIT CORRECTLY APPLIED THE LAW IN CONSIDERING THE IMPAIRMENT QUESTION.

The Fourth Circuit correctly analyzed the contract impairment issue in this case. The three-part analysis for determining violations of the Contract Clause is well-founded in the case law. Initially the court must determine whether or not the state law has, in fact, impaired any contract. If so, the court must then determine whether the contract was "substantially impaired". And if substantially impaired, the court must determine "whether that impairment is nonetheless permissible as a legitimate exercise of the state's sovereign powers". 57 F.3d at 390-391. The public/private argument necessitating a heightened review, contained in the Cities' Petition, pertains to the third prong of the test (and the deference to be afforded to the Legislature) which is not reached unless substantial impairment is found, which it was not. As evidenced by the argument in the Petition, the Petitioners are inviting the Court to leapfrog past the first two parts of the analysis (whether there is impairment and whether the impairment is substantial) and resolve this case on the basis of the legislative purposes. Additionally, the Petitioners' reliance on *Trust* is inappropriate for reasons hereinafter discussed.

As noted by the Fourth Circuit, there is a significant question as to whether the 1990 legislation constituted any impairment since the contracts contained express language whereby the Cities covenanted only to enforce and collect charges "to the full extent permitted or authorized by the laws of the State, and the rules and regulations of the PSC". *Id.* at 391.

Municipal sewer systems are public utilities and, as such, are subject to the jurisdiction and regulation of the

Public Service Commission. The preeminent power of the PSC to regulate the practices and services of municipal systems has been recognized by the Supreme Court of Appeals of West Virginia since almost the beginning of this century to the present. E.g. *Benwood v. Public Service Commission*, 83 S.E. 295 (W.Va. 1914); *City of Charleston v. Public Service Commission*, 103 S.E. 673 (W.Va. 1920); *State v. Renick*, 116 S.E.2d 763 (W.Va. 1960); *Delardes v. Morgantown Water Commission*, 137 S.E.2d 426 (W.Va. 1964). Contrary to the statement of the Cities in their Petition, these cases were not limited to rate issues but also deal with utility practices.

In the face of the express language of the contracts and the pervasive regulation of the Cities' sewer systems as public utilities, the Fourth Circuit could have held that there was no impairment to the contracts. Instead the Fourth Circuit assumed the Cities' contracts had been impaired and analyzed whether such impairment was substantial.

There is no objective evidence of reliance. The Cities submitted an affidavit of an officer of the Water Development Authority that it expected the Cities to place liens and enforce liens for unpaid sewer charges. The Water Development Authority is a state agency created by the West Virginia Legislature to buy the bonds of public sewer systems like the Cities. *West Virginia Code* §22C-1-1 *et seq.* The Fourth Circuit has appropriately discredited this affidavit. *Id.*, p. 392, fn. 9. This conclusory affidavit is obviously self-serving and is contradicted by the objective provisions of the contracts which expressly acknowledge that the Cities covenant to collect charges to the extent permitted by State law and the rules and regulations of the Public Service Commission. Furthermore, the Cities have never foreclosed on a landlord lien. *See*, Appendix B.

The Fourth Circuit correctly held that the PSC's regulation was pervasive and there was no reason to

believe the regulation would cease. Furthermore, the Fourth Circuit appropriately determined the statute and the PSC orders do not undertake to alter the terms of the contract. Instead they impose generally applicable State policy, concerning when liens can be placed on property and when services can be terminated or denied. *Id.*, p. 393, fn. 10.

The Fourth Circuit correctly found the lien provision to be a remedy and that a reasonable modification of statutes governing contract remedies is much less likely to upset expectations than a law adjusting the terms of an agreement. Finally, the Court correctly found that the lien provision did not constitute a central undertaking of the parties, and that, in any event, the Legislature had in 1989 provided the Cities with a far more effective means of collecting sewer bills by allowing for the termination of water service.

Following a complete and appropriate legal analysis, the Fourth Circuit correctly held that if there was impairment, it was clearly insubstantial.

In their Petition, the Petitioners urge this Court to grant review "in a time of some uncertainty in the municipal bond market". There is no evidence offered about such uncertainty either as a general concept or as a specific fact of significance in this case.

II. THERE IS NO CONFLICT OF LAW AS A RESULT OF THE DECISION.

The Cities have erroneously stated that the facts before the Court are essentially the same as those found in *United States Trust v. New Jersey*, 431 U.S. 1, 52 L.Ed.2d 92, 97 S.Ct. 1505, *reh'g. denied* 431 U.S. 975, 53 L.Ed.2d 1073, 97 S.Ct. 2942 (1977) and that *United States Trust* should be dispositive of this case. However, *United States Trust* is clearly distinguishable from the instant matter. In *United States Trust*, the States of New Jersey and New York passed legislation in which they specifically covenanted

and agreed with certain bondholders to provide security for their bonds. The statute at issue stated:

> "The 2 States covenant and agree with each other and with the holders of any affected bonds, as hereinafter defined, that so long as any such bonds remain outstanding and unpaid and the holders thereof shall not have given their consent as provided in their contract with the port authority, . . . neither the States nor the port authority nor any other subsidiary corporation incorporated for any of the purposes of this act will apply any of the rentals, tolls, fares, fees, charges, revenues or reserves, which have been or shall be pledged in whole or in part as security for such bonds, for any railroad purposes whatsoever other than permitted purposes hereinafter set forth." 1962 NJ Laws, c 8, §6, 1962 NY Laws c 209, §6. *Id.* at 10.

It can be stated in no clearer manner that the States were entering into, and were themselves parties to, a contract with the bondholders.

Clearly, the pivotal fact in *United States Trust* was that the State itself had entered into a contract and then unilaterally changed the terms of the contract to benefit itself. Because of this self-interest of the State, the Court held New Jersey to a higher standard in analyzing whether its legislative action had, in fact, impaired the contract at issue. Specifically, the Court stated as follows:

> "The Contract Clause is not an absolute bar to subsequent modification of a State's own financial obligations. As with laws impairing the obligations of private contracts, an impairment may be constitutional if it is reasonable and necessary to serve an important public purpose. In applying this standard, however, complete deference to a legislative assessment of reasonableness and necessity is not appropriate

> because the State's self-interest is at stake. A governmental entity can always find a use for extra money, especially when taxes do not have to be raised. If a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all." *Id.* at 25-26 [footnotes omitted]

The key element of State self-interest does not exist in the instant case. The State simply is not and never has been a party to the bond agreements. The Public Service Commission is not a party to the contract. Only the City of Charleston and the City of South Charleston and the bondholders who executed the agreements are obligated to perform under the agreements and benefit from the agreements. The action of the Legislature in eliminating landlord liens will in no way enrich the State, it will in no way relieve any burden of the State and it will in no way provide even a nebulous convenience to the State. In eliminating landlord liens, the Legislature has simply established general policy applicable throughout the State.

Accordingly, all discussion by the Cities regarding the heightened standard to be applied by the Court in instances where the State is a party to the contract is not appropriate. That standard would only be material if the Cities had themselves passed ordinances which impaired their agreements with the bondholders and the bondholders then sued the Cities. Furthermore, nowhere has the Court stated that municipal bond contracts themselves are entitled to a higher level of scrutiny than other contracts, although the Cities assert as much repeatedly in their brief. The heightened scrutiny found in *United States Trust* is, again, applicable only to contracts in which the State is a party and only where substantial impairment has been found.

Even if one were to assume different facts in this case, specifically that the State of West Virginia and the bondholders had entered into these agreements, the Cities' contract clause challenge must fail under the *United States Trust* analysis.

In the *United States Trust* decision, the Court discussed the question of valuation of the financial loss to the bondholders as a result of eliminating the security provision from the bonds. In that discussion, the Court stated that the question of valuation need not be resolved because the State had made no effort to compensate the bondholders for any loss sustained as a result of its action. The Court further noted that the security covenant was not merely modified or replaced by an arguably comparable security provision. *United States Trust*, 431 U.S. at 19. It was, instead, outrightly repealed.

In the instant case, however, it is clear that the landlord lien provision was replaced by a far superior legislated provision. As previously noted, prior to the elimination of the landlord liens, the Legislature provided the Cities with the ability to terminate water service when sewer bills were delinquent. Accordingly, under a *United States Trust* analysis, any impairment to these contracts must be valuated in light of the fact that a more favorable provision to collect delinquent bills was given to the Cities. In this context, it is clear from the undisputed affidavits of the PSC that there has been no substantial impairment. There is also no merit to the Cities' assertion that the termination of water service should not be considered a comparable security provision because such provision was provided by the Legislature before the removal of the landlord lien. The timing of the replacement security provision is irrelevant to the question of whether the provision is comparable. The *United States Trust* Court, if faced with the fact in this case, would clearly have reached a different result.

Finally, the municipal bond cases which were alluded to in *United States Trust* decision and by the Cities do not concern the procedures by which revenues are collected, as in the instant case. Instead, those cases concern liens which are the only means available to bondholders to secure their investment. The cases generally arise in instances where there has been a default on the bonds and the bondholder is attempting to enforce its rights. When the bondholder attempts to foreclose upon its lien, it finds that the State has taken some action which undermines the lien itself. This impairs the basic obligation of the bond contracts.

These facts are clearly not analogous to the instant case. The Legislature has done nothing which diverts or in any other manner impairs the revenues of the sewer system so that the bond obligations cannot be met. Furthermore, if the Cities were to default on these obligations for some reason, nothing has been done which would interfere with the bondholder's enforcement of their rights under the bond agreements. In *United States Trust*, the Legislature diverted *revenues* which placed in jeopardy the repayment of the bond obligations. In the instant case, the Legislature only modified the means by which certain delinquent bills could be collected, i.e., through water termination rather than landlord liens.

The Petitioners cite various decisions in their Petition as evidencing a conflict among circuits and with State supreme courts. There is no such conflict. Among other distinctions, there is no indication in those cases that the subject entities' practices and services were as pervasively regulated by the State as the Cities' practices and services. Nor is there any indication that those cases involved contracts that expressly acknowledged such regulation. The cases relied upon by the Petitioners can also be distinguished as follows.

The Fourth Circuit Court of Appeals addressed a Contract Clause claim in *Baltimore Teachers Union v. Mayor,*

etc. of Baltimore, 6 F.3d 1012 (4th Cir. 1993), *reh'g. denied*, *cert. denied*, 114 S.Ct. 1127, 127 L.Ed.2d 435 (1994), a case in which the Fourth Circuit reversed the determination of the District Court that a Contract Clause impairment had occurred. The Court found substantial impairment but determined that the City had exercised its power for a legitimate purpose. Baltimore City enacted a plan to reduce employee salaries which had been established in a contract between the City and the employees. The Court stated that "technical" impairments do not necessarily rise to the level of constitutional violation, while at the same time there is no requirement of total repudiation of the contract to find impairment. *Id.* at p. 1017. The Court determined that an impairment is substantial at least where the right abridged is one that induced the parties to contract in the first place and one in which there had been especial reliance. *Id.* at p. 1018. In the instant matter, the alleged impairment to the contract is only a modification of one means by which the Cities could possibly collect certain delinquent bills and, further, the Legislature provided the Cities with a more efficient means of collecting bills in the process. This legislative action is not comparable to the legislative action taken in *Baltimore*.

In *Continental Ill. Nat. Bank, etc. v. State of Washington*, 696 F.2d 692 (9th Cir. 1983), *appeal dismissed*, 460 U.S. 1077, 103 S.Ct. 1762, 76 L.Ed.2d 338 (1983), *reh'g. denied* 461 U.S. 950, 103 S.Ct. 2130, 77 L.Ed.2d 1309 (1983), the Court addressed the impairment of certain contracts entered into between a state agency, which was created to finance and build electric generation facilities, and bondholders and a federal agency. The Washington Legislature had enacted a statute which limited the ability of the state agency, WPPSS, to issue bonds to finance the construction of the power plants. The *Continental* Court stated that if the contracts involved had allowed for alteration, the legislation would not have substantially impaired the agreements. *Id.* at 697-98.

It is clear that in the instant case the bond agreements between the Cities and the bondholders do, in fact, anticipate that the collection of delinquent charges, which is the basic issue in this case, will be performed in compliance with the laws of the State of West Virginia and the Rules and Regulations of the Public Service Commission. Thus, the *Continental* Court would have reached a different conclusion if presented with the subject facts.

Furthermore, the *Continental* Court stated that it had looked to the central aspect of the agreements, the ability of WPPSS to issue more bonds, to determine whether there was an impairment. Since WPPSS could not issue more bonds, it could not complete construction of the plants. Id. at 698. Obviously, the State legislation before this Court does not limit the Cities' ability to issue bonds or generate revenue. Furthermore, the evidence indicates that the Legislature has improved the Cities' ability to collect revenues.

In *Holiday Inns Franchising, Inc. v. Branstad*, 29 F.3d 383 (8th Cir. 1994), *cert. denied*. 115 S.Ct. 613, 130 L.Ed.2d 522 (1994), the Court found that the franchisees could not reasonably be said to have had a fair and appreciable warning of an impending intervention into their agreements as a result of State regulation, because the industry had not previously been regulated in the manner that the Legislature was now attempting to impose. This is, of course, the antithesis of the instant matter, where the regulation of sewer service has been heavily regulated by the State since 1914.

The Petitioners cite *State of Nevada Employees Assoc., Inc. v. Keating*, 903 F.2d 1223 (9th Cir. 1990), *cert. denied*, 498 U.S. 999, 111 S.Ct. 558, 112 L.Ed.2d 565 (1990), as support for their contention that the Fourth Circuit's decision conflicts with other Circuits. Such is not the case. Nevada involved the enactment of a state statute for the

purpose of eliminating the right of public employees to withdraw pension contributions (they made into the state plan) without penalty. The State agreed that the State's public employees' retirement system created contractual rights between the State and the non-vested employees. The State conceded that *United States Trust* controlled the outcome of the case because the State was a party to the contract. Again, in the subject case, the State is not a party to the Cities' contracts. Furthermore, the State has no self-serving interest in the contract. Nor, has the State taken any action which has impaired the rights of bondholders.

In *New Jersey Highway Authority v. Sills*, 109 N.J. Super, 424, 263 A.2d 498 (Ch. Div. 1970), supp. opinion, 111 N.J. Super, 313, 268 A.2d 308 (Ch. Div. 1970), affirmed p.c.o.b., 58 N.J. 432, 278 A.2d 489 (1971), a statue was enacted exempting certain classes of customers from payment of turnpike tolls. The Court found that this statute impaired the bond contracts because it resulted in a direct loss of revenue, although the loss was *de minimus*. This, of course, is not analogous to the instant situation. No action has been taken by the Legislature which exempts any class of customers from paying their sewer bill. The action taken by the Legislature simply modified one methodology by which the Cities could collect certain delinquent sewer bills. There is no taking of revenue, simply a change in procedure or remedy. In fact, revenue collection has been enhanced.

By the same token, in *Patterson v. Carey*, 41 N.Y.2d 714, 363 N.E.2d 1146 (1977), a statute which rescinded a toll road increase was found to be an unconstitutional impairment of a bond contract. Again, the Court noted that this statute resulted in a loss of revenue, although a *de minimus* loss, and stated that since the toll was the sole source of funds for bond repayment, limitation on the power to collect a toll would deprive the bondholders of an essential attribute of their contract. Once again, in

the instant matter, there has been no reduction of revenue, i.e., the Legislature has not required the Cities to charge less for their sewer service. There has instead been only a modification of the process used by the Cities to collect their revenues and, as has been noted numerous times, this modification, in fact, resulted in a superior methodology for collecting revenues.

Caritas Services, Inc. v. Department of Social and Health Services, 123 Wash.2d 391, 869 P.2d 28 (1994), is also clearly distinguishable from the instant matter because in that case, the State was, as in *United States Trust*, a party to the contract. The Court determined that in an instance where the State itself is a party to the contract, the expectations defined by heavy regulation did not, and could not, include the expectation that the State would retroactively abrogate its own contracts. The Court stated that whether a party enters into a contract in a heavily regulated area or not, the State cannot refuse to meet its legitimate financial obligations simply because it would prefer to spend money for the public good rather than the private welfare of its creditors. In the instant case, of course, the State is not a party to the contract and the legislative action taken in no way involves the State's refusal to meet its financial obligations. Since the State has no financial obligations under these bond ordinances, *Caritas* is simply not applicable.

George D. Hardin v. The Village of Mount Prospect, 99 Ill. 2d 96, 457 N.E.2d 429 (1983) involved a challenge by special assessment bondholders to a state statute that allowed for the cancellation of a bond after payment had been delinquent for thirty years and allowed the city to use money it held for the payment of such bonds for any city purpose. The Court found the statute to constitute an unconstitutional impairment. Instead of being the "minor modification" claimed in the Cities' Petition in this case, the statute obviously provided for the total destruction of the bond obligations. Like many of the cases cited by the Petitioners, the State was diverting

revenues from the bondholder to other purposes. Again, that is simply not the situation in the instant case.

In conclusion, the Fourth Circuit appropriately applied its legal analysis of the impairment question. There is no conflict with existing precedent which warrants this Court's review.

III. THE FOURTH CIRCUIT PROPERLY APPLIED THE LAW IN ANALYZING THE MOTIONS FOR SUMMARY JUDGMENT.

The District Court issued an order establishing dates by which parties could file motions for summary judgment; the nonmovant could respond in opposition; and, the movant could file a final reply. Pursuant to that procedure, both the Cities and the PSC filed motions for summary judgment. The Cities did not file opposing affidavits or otherwise indicate that there were material issues of fact which required a hearing in response to the PSC's motion for summary judgment.

Although, in the abstract, Petitioners are correct when they assert that inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion, there are no inferences to be drawn from the underlying facts in this case. Again, the Cities did not file opposing affidavits to the PSC's affidavits. The affidavits contained in the Appendix to the Cities' Petition were filed with their motion for summary judgment. The problems with the Cities' affidavit from the Water Development Authority in support of their motion for summary judgment have been previously discussed. The statistics regarding the percentage of delinquent accounts in relationship to rental property, contained in Charleston's affidavit of Mr. Collison, are meaningless in resolving the impairment issue, as in the remainder of his affidavit. The bottom line is that there is no genuine issue as to any material facts in this case.

The fundamental standard applicable to motions for summary judgment under Rule 56 of the *Federal Rules of Civil Procedure* is to be found in the Rule itself. A motion for summary judgment *must* be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), F.R.C.P. Although Rule 56 has been part and parcel of Federal practice and procedure for a number of years, the interpretation and application of the Rule has been significantly defined by a trilogy of landmark decisions which the United States Supreme Court handed down in 1986. *See Matsushita Elec. Co. v. Zenith Radio*, 475 U.S. 574, 89 L.Ed.2d 538, 106 S.Ct. 1348 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 91 L.Ed.2d 202, 106 S.Ct. 2505 (1986); and *Celotex Corp. v. Catrett*, 477 U.S. 317, 91 L.Ed. 2d 265, 106 S.Ct. 2548 (1986).

Under the standard clearly articulated in the *Matsushita*, *Anderson* and *Celotex* cases, a movant for summary judgment under Rule 56 bears the initial burden "of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex*, 477 U.S. at 323, *quoting* Rule 56(c), F.R.C.P.

When a movant satisfies its threshold burden, the "opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586. *See also*, *Celotex*, 477 U.S. at 323-24. A non-movant must go beyond the pleadings and present evidence of a genuine issue for trial. *Matsushita*, 475 U.S. at 587, *citing* Rule 56(e), F.R.C.P. The *Anderson* Court strongly emphasized the significance of the words "genuine" and "material" as set forth in Rule 56(c):

> "By its very terms, this standard [Rule 56(c)] provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact.
>
> As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson*, 477 U.S. at 247-248.

In other words, evidence presented by the non-movant must be of sufficient "caliber or quantity" that a finder of fact would be able to conclude that the non-movant has established each element of its claim by a preponderance of the evidence or by any other standard which may apply. *Id.* at 254. Moreover, summary judgment is mandated under the Rule where a party who bears the ultimate proof "fails to make a showing sufficient to establish the existence of an element essential to that party's case." *Celotex*, 477 U.S. at 322. "[T]here can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial." *Id.* at 323.

Conclusory and accusatory statements, even if set forth in affidavit or deposition testimony, are completely inadequate to resist a motion for summary judgment:

> "Neither conclusionary allegations nor general denials perpetuate an issue of fact under Rule 56, and if such undisputed facts effectively pierce the sham of false generality of claims, the case is ripe for summary disposition."

John Hopkins University v. Hutton, 297 F.Supp. 1165, 1201 (Dist. of Md. 1968), *rev'd. in part, aff'd in relevant part*, 422 F.2d 1124 (4th Cir. 1970), (*quoting Bumgarner v. Joe Brown Company, Inc.*, 376 F.2d 749, 750 (10th Cir. 1967), *cert. denied*, 389 U.S. 831, 19 L.Ed.2d 90, 88 S.Ct. 99 (1967)).

One of the principal purposes underlying Rule 56 is to weed out claims which are factually unsupported. *See Pocahontas Supreme Coal Co. v. Bethlehem Steel*, 828 F.2d 211 (4th Cir. 1987). As stated by the *Celotex* Court, "the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trail." *M&M Medical Suppliers v. Pleasant Valley Hospital*, 981 F.2d 160, 163 (4th Cir. 1992) (*quoting Celotex*, 477 U.S. at 322).

In this case, the Cities were required to prove that their contracts have been unconstitutionally impaired. They have submitted no evidence of impairment. Instead, they have relied on the argument, without factual support, that since the 1990 Legislation removed the lien landlord provisions, it must be concluded that their contracts have been substantially impaired. However, this approach is inconsistent with the legal standards for evaluating Contracts Clause cases.

As herein discussed, it must first be demonstrated that the lien provision is an "obligation of the contract." Assuming *arguendo* that the lien provision is an obligation of the contract, the Cities must show that there has been substantial impairment of the obligation of the contract. They have made no such showing. The Public Service Commission was the only party to perform a financial analysis of the effect of eliminating the lien provision. That analysis concludes that there has been no negative effect. In fact, the Commission's analysis shows that the

effect of the 1989 and 1990 Legislative amendments have improved the Cities' ability to collect delinquent bills. That analysis was not factually disputed.

The Cities have failed to meet their burden of proof. Their motion for summary judgment was properly denied and the Commission's Motion for Summary Judgment was properly granted.

IV. THE COMPLAINT COULD HAVE BEEN PROPERLY DISMISSED NOTWITHSTANDING THE IMPAIRMENT ISSUE.

As indicated by the Fourth Circuit in its decision, because it disposed of the merits of the impairment claim, it was unnecessary for the Court to address the following other dispositive matters raised by the Public Service Commission.

a) The Public Service Commission argued that the Cities lacked standing to bring the suit. Although the Fourth Circuit addressed this issue without deciding it from the perspective of whether a city could sue its creator State, the Public Service Commission asserted and argued that there was no jurisdiction under Article III of the United States Constitution because there was no showing of actual or threatened injury to the Cities as a result of alleged State action. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472, 70 L.Ed.2d 700, 102 S.Ct. 752 (1982).

b) The Public Service Commission asserted that the Cities were barred from asserting their claim under the West Virginia statute of limitations which required them to file their federal court suit within two years of the effective date of the 1990 legislation, which was June 9, 1992. Since the Cities did not file their complaint until February 24, 1993, their action was barred.

c) Although the Cities could have appealed the 1992 orders of the PSC directly to the State Supreme Court, they did not The principles of res judicata and collateral estoppel bar the subsequent suit in Federal District Court.

CONCLUSION

The Petition for Certiorari should be denied. The Fourth Circuit committed no legal or factual error in ruling on the impairment issue and this case presents no issue appropriate for the Court's review.

Respectfully submitted,

RICHARD E. HITT
Counsel of Record for the Respondents
P. O. Box 812
Charleston, West Virginia 25323
(304) 340-0317

APPENDIX

APPENDIX A

Rule 4.08 of the Commission's Rules and Regulations for the Government of Water Utilities, 150 CSR 7, Rule 4.8.3.

4.8.3. Insufficient reasons for disconnecting service—The following shall not constitute sufficient cause for refusing, denying or discontinuing service to an applicant or present customer:

Delinquency in payment for service by a previous occupant of the premises to be served other than a member of the same household.

APPENDIX B

IN THE UNITED STATE DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON

THE CITY OF CHARLESTON, and THE CITY OF SOUTH CHARLESTON, *Plaintiffs,* v. THE PUBLIC SERVICE COMMISSION OF WEST VIRGINIA; BOYCE GRIFFITH, Chairman; OTIS D. CASTO, Commissioner; and RICHARD D. FRUM, Commissioner, *Defendants.*	CIVIL ACTION NO. 2:93-0161

STATE OF WEST VIRGINIA,
COUNTY OF KANAWHA, To-Wit:

SECOND AFFIDAVIT OF BIRDIE GANDY, CPA

I, Birdie Gandy, after being first duly sworn do depose and say that:

I have reviewed the Affidavits of William B. Collison and Annette Hancock filed in this matter by the Plaintiffs as attachments to the Plaintiff's Motion for Summary Judgment. Having reviewed these affidavits, I am of the opinion that the statistics found therein regarding the number of delinquent accounts for the City of Charleston and the City of South Charleston and the character of these accounts, i.e., rental property or owner-occupied property, are irrelevant to the matters presently before the Court. These statistics do not show that the Cities' ability to meet their bond obligations has been in any way negatively affected by the elimination of landlord liens. To the contrary, as stated in my initial Affidavit filed in this matter, the Cities collection of revenues has, in fact, improved since the elimination of the landlord liens. According to the information presented by the Plaintiffs, neither the City of Charleston nor the City of South Charleston has ever foreclosed on a landlord lien even when permitted to place such liens upon property as a result of tenants' failure to pay sewer bills. Clearly, the placement of liens is not an effective means by which to collect delinquent sewer bills. The termination of water service, however, is an extremely effective tool for use by the utilities in the collection of delinquent bills and has greatly improved sewer bill collection. This is shown by the fact that the City of Charleston's billed revenue has increased by $203,375, or 4.7%, since 1990 while their accounts receivables have decreased by $302,070, or 44.7%, since 1990. The City of South Charleston's billed revenue has increased by $858,875, or 29.3%, since 1990 and their accounts receivables have decreased by $16,948, or 4.2%, since 1990. The termination of water service provides a process whereby money is immediately collectible as a result of such termination of service. The imposition of landlord liens provides a process by which the collection of money is in the distant future, if ever.

The Cities of Charleston and South Charleston will also lose much more revenue by the elimination of their late penalties than by the elimination of landlord liens. The City of South Charleston is currently not charging delayed payment penalties. The City of Charleston has recommended to the City Council that the delayed payment penalty be eliminated from its sewer bills. The 1993 Annual Report filed by the City of Charleston states that $76,872 was collected in late penalties. The City of Charleston does not keep records for final bills. However, using the final bill percentages provided by the City of South Charleston, and extrapolating those percentages to the City of Charleston, it is clear the City of Charleston would collect, at most, $11,462 as a result of placing liens upon rental property. The City of South Charleston, as previously noted, is not charging delayed payment penalties for delinquent bills. However, in using the delayed payment percentage for the City of Charleston and extrapolating that statistic to the billed revenues of the City of South Charleston, it is estimated that the City of South Charleston is losing approximately $64,160 in revenue by not collecting the late penalty. As stated in my initial affidavit, the City of Charleston will lose a maximum of $9,407 in revenues as a result of the elimination of landlord liens.

Finally, I will note that the Plaintiffs have stated in their affidavits filed with the Court that both the City of Charleston and the City of South Charleston consider a bill delinquent after 60 days. This is, however, irrelevant to the issue now before the Court. The Water Termination Agreements the parties have entered into with the West Virginia-American Water Company state that a bill must be unpaid for a period of not less than 60 days before the termination of water service can be instituted. Accordingly, the balances showing delinquent bills which are less than 60 days old do not reflect the full extent of the Cities' ability to collect delinquent accounts, i.e., the

balances do not reflect the threat of termination of water service if the bill is not paid.

Further the affiant sayeth not.

/s/ Birdie Gandy

Birdie Gandy, CPA

Taken, sworn to and subscribed before me the undersigned authority on this the 3rd day of December, 1993.

My commission expires January 11, 2001.

/s/ Creed Adkins